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The problem in the New Rochelle community was one that allowed segregated schools to exist through the "neighborhood school" policy, where children were forced to attend the school in their neighborhood. The complaint also stated that the Lincoln Elementary School, under question, was attended only by Negro children, that the teaching was inferior, that the curriculum was inferior, and that the children, as a result of the existing situation, were receiving an education below that of the rest of the elementary school children.

After the hearing, the judge decided in favor of the Negro case. He claimed that the school board was responsible for gerrymandering the Lincoln district so that white children would be sent to the other elementary schools.

The plan that Judge Kaufman accepted would allow any pupil attending the Lincoln Elementary School to transfer to any other elementary school in New Rochelle. Stipulations included that there be a place waiting for the child who wished to transfer, that he be recommended to transfer, and that permission be granted on a yearly basis.

An appeal was granted in favor of the original decision. The outcome of the plan showed no administrative chaos, as was expected, but rather an increase in stimulation of the children who did transfer. The percentage of Negroes in Lincoln dropped from 94 to 88.

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Public Schools

Cities in the North and West

1962

NEW ROCHELLE

File

By John Kaplan

A Report To

THE UNITED STATES COMMISSION ON CIVIL RIGHTS

Bennett O. Stalvey

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Part 2. New Rochelle, New York

Introduction

More school "desegregation" cases are pending in the State of New York today than in any other State in the Union. In each of these disputes, as well as in many others throughout the North, a powerful argument for settling out of court has been the cry, "We don't want to become another New Rochelle." Although the *New Rochelle* case[1] is the only decision to date[2] in which a northern community has been found to have violated[3] the constitutional prohibitions laid down in *Brown* v. *Board of Education*, its importance extends far beyond the boundaries of that small city.

New Rochelle is important not only because it became the "Little Rock of the North," but because its case presented in microcosm so many of the vital moral, constitutional, and educational questions facing the United States today. Since this case has been so widely misunderstood both as to its facts[4] and the law[5] it laid down, this report will concentrate primarily upon the litigation itself. By doing this it is not implied that the events leading up to the Federal court action or its aftermath are of any less importance. In fact, a strong argument can be made for the proposition that the really important questions about the *New Rochelle* case are, first, how did community relations in a liberal northern community break down so completely that this dispute had to be resolved in the courts; and second, how is New

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[1] *Taylor* v. *Board of Education of New Rochelle, N.Y.*, 191 F. Supp. 181 (S.D.N.Y. 1961), 6 *Race Rel. L. Rep.* 90 (1961) *appeal dismissed*, 288 F. 2d 600 (2d Cir. 1961), 6 *Race Rel. L. Rep.* 418 (1961); 195 F. Supp. 231 (S.D.N.Y. 1961), 6 *Race Rel. L. Rep.* 700 (1961), aff'd., 294 F. 2d 36 (2d Cir. 1961), 6 *Race Rel. L. Rep.* 708 (1961) stay denied, 82 Sup. Ct. 10, *cert. denied*, 82 Sup. Ct. 382 (1961).

[2] In *Clemons* v. *Board of Education of Hillsboro*, 228 F. 2d 853 (6th Cir. 1956), 1 *Race Rel. L. Rep.* 311 (1956), *cert. denied*, 350 U.S. 1006 (1956), the plaintiffs also received relief but Hillsboro, Ohio, located across the Ohio River from Kentucky, was at this time more southern than northern in outlook.

[3] It is ironic, in view of later happenings, that shortly after the Supreme Court decided *Brown* v. *Board of Education*, teams of students and teachers from Washington, D.C., and Baltimore visited New Rochelle to see a successfully integrated school system in operation.

[4] See *Time*, Sept. 7, 1962, p. 33.

[5] See *e.g.*, 38 *Chi-Kent L. Rev.* 169 (1961).

Rochelle attempting to pick up the pieces left after the community has been badly split, after its educational system has been severely strained, and after the large majority of its citizens has been completely routed in a series of battles with a much smaller group.

New Rochelle, in southeastern Westchester County, is a long thin suburb of New York City, separated from that city only by a narrow strip of the Pelhams on the very south. It runs northward into central Westchester County, extending like a wedge into Scarsdale[6] on the north. Its population as of the 1960 census was about 77,000, of whom approximately 14 percent were Negro, 45 percent were Catholic[7] and 30 percent were Jewish. The Negro population of New Rochelle is primarily located in the center of the city, while the southwest is predominantly Italian and the north overwhelmingly Jewish.

This clumping of ethnic groups has never caused any problem in either the senior or junior high schools. New Rochelle has a single comprehensive senior high school serving the whole city, and two junior high schools, each of which also has a heterogeneous population, reasonably representative of the entire community. In the elementary schools, however, there was at the time of the litigation a much more serious problem. Seven of these schools—Lincoln, Washington, Mayflower, Webster, Columbus, Stephenson, and Barnard—could be called "central schools"; three—Ward, Davis, and Roosevelt—"northern"; and two—Trinity and Jefferson—"southern." (See appendix H.) Just two of these elementary schools, Stephenson and Barnard, contained truly mixed student bodies reflecting the community's ratio of Italian, Irish, Jewish, Negro, and white Protestant population, but it was only the dichotomy between Negroes and whites that became relevant in the Lincoln dispute. As appendix A shows, eight of the elementary schools are racially integrated: they contain a population in which neither whites nor nonwhites could be regarded as overwhelmingly preponderant in view of the overall community ratio. Of the remaining nonintegrated schools, only one was the focus of the New Rochelle litigation. This was the Lincoln Elementary School.

Although, of course, more details will be supplied during the consideration of the litigation and the facts brought out therein, the following brief review of the Lincoln dispute will serve for orientation. The Lincoln school was built as the Winyah Avenue School in 1898 to serve an all-white, "silk stocking" neighborhood in the northern part of the town. After 1898, areas farther and farther north of the school became more heavily settled, with the effect of moving the center of town nearer the school. Meanwhile, Negroes began moving into this area, so that by 1930 the school was almost one-fourth Negro.

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[6] The northern end of New Rochelle, a high-priced residential area, extends into Scarsdale, which is often called America's richest community.

[7] About half the Catholic population is made up of persons of Italian extraction; most of the rest are of Irish descent.

Sometime before 1930, the Winyah Avenue school was renamed the Lincoln school, and minor as this change is, it is in a way typical of a great part of the battle in New Rochelle. Certain of the Negro leadership has charged[8] that this renaming was a recognition of the increasing percentage of Negroes in the school, and that it either was meant derisively or sprang from a misplaced feeling that Negroes would be proud to go to a school named after the man who freed the slaves. This charge has been attacked as irresponsible by others who assert that the school name was changed when Winyah Avenue was renamed Lincoln Avenue, apparently because of difficulty in pronouncing and spelling such an unusual name, and because Winyah Avenue, New Rochelle, was an extension of Lincoln Avenue in the nearby communities of North Pelham and Mount Vernon.[9]

Over the years the Lincoln school became more and more heavily Negro until by 1949 it was 100 percent Negro. Then, in response to a growing number of complaints from Negro and prointegration white groups, the New Rochelle School Board[10] took its first concrete action aimed at altering the racial imbalance in the Lincoln school. It had been noticed that white children in the Lincoln area had taken advantage of the board's transfer policy to attend other schools. It was calculated that since 106 white pupils residing in the Lincoln school zone were attending other elementary schools, and since only 200 Negro children were attending Lincoln, an integrated school, approximately two-thirds Negro, could be achieved if transfers were prohibited. Accordingly, the school board announced a rigid zoning policy whereby transfers out of the zone of residence were in effect prohibited. Few of the area's white students, however, returned to Lincoln. They either entered parochial and other private schools, or moved out of the Lincoln district within a year or two. Thus, by 1960, the student body of Lincoln school was approximately 94 percent Negro,[11] and although no one can state precisely the racial composition of the Lincoln zone itself, most observers state that, since the restriction on transfers, the population of the area has become more heavily Negro.[12]

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[8] Brief of Appellants "In the Matter of the Appeal of Hallie Taylor, Evelyn Bartee, Dorothy Tisdale, Barbara Hall, Eula Williams from the action of the Board of Education of the City School District of New Rochelle, New York," in proposing to build a new K–6 school on the present site. . . . Before the Commissioner of Education, p. 9.

[9] In fact, neither version appears to be correct. The Lincoln school received its name in 1919 when the board renamed the Winyah Avenue School after Abraham Lincoln, and the Weyman Avenue school after Thomas Jefferson. At the time, Lincoln's Negro population was less than 10 percent. Winyah Avenue was renamed Lincoln Avenue much later, at the same time as North Pelham changed its Fourth Street to correspond to Lincoln Avenue in Mount Vernon.

[10] The school board, technically called the board of education, is composed of nine residents of the community appointed by the mayor for 5-year terms.

[11] It should be noted that while the Lincoln School was 94-percent Negro, two-thirds of the Negro elementary school pupils in New Rochelle attended schools other than Lincoln.

Although there had been numerous complaints about the Lincoln problem, no general community attention was focused on it until the school board proposed in 1957 to rebuild the by then obsolete Lincoln on the same site. This proposal was submitted to the voters, along with many other requests for school funds, and together with most of the other proposals, it was soundly defeated. It was generally believed in the community that the Lincoln issue was not a major reason for the defeat suffered by the board, the main causes being the size of the total amount requested and a dispute over the location of the proposed new high school. Nevertheless, both the NAACP and the Urban League had opposed the rebuilding of Lincoln school, and it was generally felt that the problem of racial imbalance in Lincoln was a contributing reason for the rejection of the board's bond proposals.

During and after the 1957 referendum campaign as a result of the attention focused on the Lincoln school, the board undertook to have a number of studies of the problem made. The most comprehensive was the Dodson report, prepared by a distinguished team of educators headed by Prof. Dan W. Dodson, director of the Center for Human Relations and Community Studies at New York University. The then superintendent of schools of New Rochelle, Dr. Herbert C. Clish, now dean of the School of Education at St. John's University in New York, also prepared a number of reports, and interested citizens and groups submitted and debated their own solutions. Meanwhile, the Lincoln school was growing steadily more antiquated, and in 1960 the board of education, over the vigorous dissent of two of its members, proposed a referendum to rebuild it on the same site. Before this decision was made, three of the many proposals which had been put forth had received support from factions on the board. These were (1) the closing of the Lincoln school and the distribution of its students by rezoning of nearby school districts; (2) the building of a k–3 (kindergarten through third grade) school on the site of Lincoln to provide a neighborhood school for the kindergarten and the first three grades while allowing the top three grades to be distributed to the surrounding schools; and (3) the rebuilding of the

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[12] One of the major reasons for the preponderance of Negroes in the Lincoln school is the location in the area of a large public housing project, the Hartley Houses. This project is overwhelmingly Negro. A great deal of semantic effort has been expended over whether this is mere imbalance, in housing and in schools, or is "segregation." Certainly, it is not segregation by operation of law, southern style, where the separation of races is the effect intended by law. On the other hand, if, as the dictionary indicates, segregation means merely a state of separation, simple racial imbalance regardless of the cause is segregation. This, of course, merely puts off the important question as to what effect the Supreme Court segregation decision has on racial imbalance, actual segregation, or whatever one calls it.

Lincoln school on the same site. At the board meeting called to dispose of the problem, it became obvious after a short discussion that the first course of action would not be approved, since only two of the nine board members supported it. The second was defeated by a 5–4 vote, with the two members who supported the closing of Lincoln school joining two others. The five-member majority who voted against the first two plans felt that the only course open to the school board was to ask the voters to approve a bond issue to replace Lincoln with a school of the same size, on the same site. At this point, one of the minority members suggested a compromise whereby the new school would be built to house 400 pupils,[13] 100 less than its actual enrollment of 500. These 100 pupils would then be distributed to other schools, thus allowing one-fifth of the Lincoln student body to attend schools that were not racially unbalanced. The remainder of the students in the zone would attend the new Lincoln school and wait either for a change in the neighborhood or for their entrance into junior high school before they would attend a racially balanced school. After some discussion the majority agreed to this compromise, and it was passed by a 7–2 vote.

Before the board's proposition could be placed on the ballot, however, a number of Lincoln parents brought an action before the New York Commissioner of Education to restrain the school board from attempting to rebuild the Lincoln school and to require it to take steps to end the racial imbalance there. The commissioner ruled against their contentions on the ground that the decision of the board did not appear discriminatory on its face and was within the general jurisdiction of a board of education to decide questions of site selection, zoning, and construction of schools.

The proposition to rebuild the Lincoln school was then placed on the ballot by the board of education, and after a vigorous campaign during which reams of literature were produced by all sides, the bond issue carried by a 3-to-1 majority. Amidst the general rejoicing and relief in the community that the Lincoln issue had finally been solved, one fact escaped general notice. While every other zone had supported the proposition to rebuild the Lincoln school, the residents of the Lincoln area had voted against it.[14]

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[13] The capacity of the Lincoln school was approximately 625 students.

[14] More specifically, while the voters in each of the other elementary school election districts supported the referendum by margins of from approximately 3 to 1 to about 6 to 1, the voters in the Lincoln district rejected the proposal by about 1.36 to 1. It is interesting to note that no observable pattern appears in the voting in the other districts. Although, aside from the Lincoln district itself, there were wide variations between districts in the percentage in favor of the Lincoln referendum, these variations did not appear to correspond to the distance from Lincoln, the percentage of Negroes, Italians, or Jews, or the average income in the district.

Preface

Although this report concentrates on the New Rochelle litigation, it does not restrict itself to the happenings in court. To be sure, all the court records together with the approximately 2,000 pages of reporter's transcript and exhibits were studied, and interviews were held with most of the participants in the case. A great deal that went into this report, however, was obtained from the more than 100 residents of New Rochelle, including the school authorities, who consented to be interviewed and provided a great number of documents for study. Without their help, the writing of this report would have been impossible.

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Chicago, Ill.

AUGUST 1, 1962.

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Nonetheless, at this point the school board felt that the controversy was in great part over; that the unhealthy split in the community was well on its way to being repaired; that the rebuilding of the Lincoln school could begin; and that the racial imbalance in the Lincoln school was to be with the community for the foreseeable future. The board reckoned, however, without Paul Zuber.

Despite the widespread belief in the community that Mr. Zuber was one of a number of professional agitators who solicited the legal business from a group of local Negroes and then financed and directed the litigation, the truth appears to be that the plaintiffs who had lost their case before the New York Commissioner of Education had decided not to give up the battle, and approached Paul Zuber at his home in Croton-on-Hudson. Mr. Zuber, a 35-year-old Negro lawyer, was just beginning to make a reputation as a successful advocate in this type of suit. He had recenly won the famous *Skipwith* [15] case in New York City, wherein the court held that no Negro child could be compelled to attend an overwhelmingly Negro school where such schools were demonstrably inferior. Mr. Zuber advised the New Rochelle group to follow the tactics that he had successfully employed in *Skipwith:* they were to withdraw their children from the Lincoln school and attempt to register them at other public schools. This would, Mr. Zuber felt, not only garner a great deal of publicity, but would also create a favorable climate of opinion for the litigation which was to follow. The parents followed Mr. Zuber's program and received even more publicity than anticipated when the New Rochelle authorities prosecuted them for truancy and for loitering near a school. Then Mr. Zuber commenced the Federal court litigation.

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[15] *In the Matter of Skipwith,* 180 N.Y.S. 2d 852 (Dom. Rel. Ct. N.Y.C. 1958), 4 *Race Rel. L. Rep.* 264 (1959). The issue arose in a domestic relations court proceeding brought by the board of education to declare Negro parents guilty of neglect because they had withdrawn their children from the school system in protest against allegedly inferior schools. The court not only refused to find the parents guilty of neglect, but held that they had a right to refuse to obey the New York compulsory education law because the racially unbalanced schools to which they had been assigned had been allowed by the city to become inferior.

The Complaint

On Friday, October 21, 1960, Mr. Zuber filed his complaint against the New Rochelle Board of Education. It charged the defendant school board with violating the constitutional rights of the Negro plaintiffs and others similarly situated by "pursuing a policy . . . generally described as the neighborhood school policy." Mr. Zuber's complaint went on to state:

> It has been well recognized that in many cities of New York State, and elsewhere, ghettos exist in which minority groups, usually minority racial groups are crowded. As a result thereof, the public schools in such neighborhoods in such cities are segregated, reflecting the segregated pattern of the neighborhood. The utilization of the "neighborhood school" policy in such areas must, of necessity, produce segregated schools. This fact pattern set forth herein also exists in the city of New Rochelle. It exists there by reason of the fact that the defendants continue to maintain the aforesaid "neighborhood school" policy as a basis for the registration of children required, under the Education Law of the State of New York, to attend the elementary schools. The fact is that so long as the defendants adhere to this "neighborhood school" policy in the city of New Rochelle, segregated schools will exist there.

The complaint further alleged that (1) the Lincoln school was "attended only by Negro children," (2) the "educational background and length of experience" of its teachers was inferior to that of teachers in "white" schools, (3) the curriculum offered at Lincoln was inferior to that offered in the "white" schools, and (4) as a result of the use of the neighborhood school policy—

> . . . the plaintiff children, and other Negro children attending the racially segregated school, do not achieve at their natural intellectual potential, as the white children attending the all-white school achieve in respect to their natural intellectual potential.

Accordingly, the complaint asked that the court enjoin the operation of the neighborhood school plan as applied to the Lincoln district, require the school board to register the plaintiffs at racially integrated schools, and prevent the construction of the new Lincoln school so long as the neighborhood school policy was in force. It should be noted that this complaint did not charge the board with deliberately taking any action for the purpose of discriminating against the plaintiffs because they were Negro, nor did it charge the board with gerrymandering or with any other bad motive. The complaint, in essence, was a frontal assault on the problem of "de facto segregation" and was based upon this simple syllogism: A neighborhood school in an all-Negro area will be all-Negro, and, therefore, segregated. The State cannot constitutionally compel any student to go to a segregated school. Therefore, the application of the neighborhood school policy to an all-Negro residential area is unconstitutional.[16]

In addition to the relief requested in the complaint, Mr. Zuber, in a separate order to show cause, asked for a temporary injunction, that is, a preliminary injunction preventing the school board from taking any action which might be in violation of the constitutional rights of the plaintiffs, until the matter had finally been determined by litigation. An order to show cause is merely a procedural step whereby the defense is called upon to present its reasons why a preliminary injunction should not be granted, pending final decision of the case. Contrary to the implications of its title, the order to show cause does not alter the burden of proof in any way. As in all cases, the plaintiff must still prove that he is entitled to the relief he has requested. However, where, as here, a preliminary injunction is at issue, all the plaintiff needs to prove is that he might possibly win on the merits of the litigation and that he requires the injunction for his protection until the court determines the final result of the suit.

On October 27, the date set for the hearing on the order to show cause why the preliminary injunction should not be granted, Murray Fuerst, corporation counsel for the city of New Rochelle and attorney for the board of education, appeared and asked the court not to grant a preliminary injunction, arguing that to do so would stamp the community with a judicial condemnation. Mr. Fuerst stated that the matter could be gone into thoroughly any time the plaintiffs were ready—"in a day or a week, as the court may choose"—and that, therefore, a temporary injunction was not necessary. Moreover, to show the good faith of the school board, Mr. Fuerst agreed that the construction of the new Lincoln school would not begin until the litigation had been concluded, and that the hearing on the preliminary injunction might be combined with the final trial on the merits, so that only one decision would be necessary. Mr. Zuber and Judge Irving R. Kaufman agreed to this, and the trial was set for November 15.

At this hearing Mr. Fuerst, an extremely competent lawyer with an encyclopedic knowledge of school law, agreed to combine the preliminary injunction hearing with the trial on the merits for two reasons: first, he assumed that the granting of a temporary injunction by Judge Kaufman would have stamped the community with a "badge of infamy." This would have been true, to paraphrase Justice Harlan, only if the community had so considered it. In reality, the granting of the temporary injunction merely would have meant that there was a constitutional question here—which nobody really denied—and that the plaintiffs' rights had to be protected until the question was decided. In theory, of course, the judge in granting a preliminary injunction might have done more than merely enjoin the rebuilding of the Lincoln school; he might have ordered the admission of the plaintiffs to racially balanced schools pending the trial. This, however, would have been most unlikely since Federal judges are, in general, extremely careful to restrict the use of the temporary injunction to cases where serious harm might result—not to cases where, as here, the plaintiffs have been living under the conditions complained of for some time. Moreover, it is most unlikely that Judge Kaufman would have required the admission of these plaintiffs to schools other than Lincoln, realizing that a final order might determine that they had no such right and might allow their removal back to Lincoln. Secondly, Mr. Fuerst agreed to the early trial on the merits simply because he had not appreciated the complexity of the case. He had been misled by the general allegations of Mr. Zuber's complaint and by the lack of any charge of deliberate gerrymandering or other actions with bad motives.

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[16] Despite this allegation in the complaint that the Lincoln school was all Negro, Mr. Zuber realized that the school had 6 percent white children. Once his basic proposition had been established, Mr. Zuber expected to argue that the difference between all Negro and 94-percent Negro was not legally significant.

Shortly after the October 27 hearing, the school board called in Julius Weiss to take charge of the litigation. Mr. Weiss, a New York attorney and a former president of the New Rochelle Board of Education, was widely respected in New Rochelle where he had been active in civic affairs for over 30 years. At this point in the litigation it was clear that the acts of the board of education, over a reasonably long period, would be challenged. Thus, in accepting the case, Mr. Weiss, as one of the presidents of the board of education during the 1950's,[17] put himself in a position in which he might have to defend his own actions, as well as those of the board. Although Mr. Weiss' complete familiarity with the factual background of the case would be an advantage in view of the short time for preparation, his closeness to the problem might prevent him from giving the dispassionate and objective services that are a most important stock in trade of the lawyer.

On coming into the case, Mr. Weiss discovered that the issues were a great deal more complicated than had first appeared and that the case would require a great deal of time, effort, and investigation. On November 14, the day before the trial was to begin, he therefore appeared in Judge Kaufman's chambers and asked for an additional month to prepare for trial. At first, Judge Kaufman suggested granting a 24-hour delay, but, after some urging the judge finally compromised with Mr. Weiss, agreeing that the combined trial and hearing be postponed for 1 week and set for November 22. It should be noted that, despite charges that Judge Kaufman hurried the board into trial, this speed was not unusual so long as the question of the preliminary injunction remained. Since the issue on the temporary injunction was vastly less complicated than the final resolution of the merits, the judge felt that the board had already been given too much time. But since the school board had agreed that the injunction hearing and trial be combined, Mr. Weiss was still thinking in terms of a final trial on the merits.

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[17] In fact, he was president of the board's referendum committee working for passage of the ill-fated 1957 referendum.

On November 21st, the day before the combined hearing on the preliminary injunction and the trial on the merits, Mr. Weiss again appeared before Judge Kaufman. This time he made a formal motion for the appointment of a panel of three judges to decide the constitutional question. The Federal statute[18] providing for the three-judge court was passed to prevent the disorganization of State functions by single Federal judges declaring State statutes unconstitutional. Because of its drain on the manpower of the Federal judiciary, however, the three-judge requirement has been construed very narrowly, and no three-judge court is required where only a State administrative action or a municipal ordinance, as distinguished from a State statute, is alleged to be unconstitutional. Although Mr. Zuber had not challenged any State statute in his complaint but merely a policy of the board of education, Mr. Weiss made and argued his motion vigorously, and Judge Kaufman denied it.

Mr. Weiss next announced that he was going to move on the following day, the date set for the combined hearing and trial, to dismiss the complaint, and that he wished this motion to be decided before he made his final preparations for trial. A motion to dismiss a complaint is not an unusual one. It is based on the argument that the complaint does not, in the language of rule 12(b) of the Federal Rules of Civil Procedure,[19] "state a claim upon which relief could be granted." In other words, even if every word in the complaint were true, the school board would still have violated no constitutional right of the plaintiffs. This motion was by no means obviously ill-founded. A strong argument can be made that Mr. Zuber's bare allegations, without any charge of intentional discrimination by the board, were not a sufficient charge of unconstitutional action. Mr. Zuber had presented, in his frontal attack on the neighborhood school policy, an extremely difficult question of constitutional law. In a New York State court the judge would have been required to determine this legal question and dismiss the complaint without hearing witnesses if he decided against the plaintiffs. Federal courts, however, do not follow what is known as "fact pleading," but rather what is called "notice pleading." In the Federal courts, the only function of the complaint is to alert the parties to the general issues involved in the litigation, while the pretrial narrowing and sharpening of the issues is done by requests for admissions, interrogatories, depositions, and pretrial conferences. Therefore, the Federal courts have generally held that if under any conceivable circumstances the plaintiff's general area of complaint could state reasons for the court to grant relief, the motion to dismiss the complaint should be denied and a hearing held on the merits of the case.

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[18] 28 U.S.C. sec. 2281: *Injunction against enforcement of State statute; three-judge court required.*

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

[19] Technically Mr. Weiss did not follow the wording of the Federal rule, but rather used the State practice of moving to dismiss "for failure to state a cause of action."

In announcing his forthcoming motion to dismiss, Mr. Weiss took the view that since the motion was to be made on the day of the combined hearing and trial, the judge should decide the sufficiency of the complaint and then set a new date for the calling of witnesses. Otherwise, Mr. Weiss argued, the judge might grant the motion to dismiss the complaint and unnecessarily inconvenience all the witnesses who had come expecting to be heard. To Judge Kaufman, however, this request suggested a desire on the part of the school board to delay the proceedings. It is standard procedure in the Federal courts to rule that where a defendant makes a motion to dismiss, he must be prepared to proceed with the case in the event the motion is denied. It is not regarded as any confession of weakness to be prepared for the loss of a motion, and even though it may require extra time and effort to summon witnesses who may prove unnecessary in the event of the dismissal, the common sense observation that nowadays very few complaints are in fact dismissed has made it the general practice of Federal judges not to delay the calling of witnesses[20] pending the decision on such motions.

In discussing the procedure to be followed on Mr. Weiss's motion to dismiss the complaint, Judge Kaufman again made clear his concern with the necessity for speed where temporary injunctions were involved.

> [Because of your statement] "Yes, I will go to trial November 15th," . . . I then induced Mr. Zuber to [consent to the combination of the trial and] temporary injunction, because I said, "Let's dispose of the whole thing now." . . .

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[20] Rule 12(c) of the Federal Rules of Civil Procedure explicitly provides that a related motion—for judgment on the pleadings—not be made so as to delay trial.

> Now I don't think I need labor the point. If you want time for trial, it is another thing. I want to expedite this, but I am going to proceed with dispatch on the hearing for this temporary injunction . . . There seems to be a difference of opinion now as to whether you want a trial. But as to the hearing then on the motion for temporary injunction, that I cannot delay any more. It is almost a month since it was returnable . . . we will proceed then on a hearing of the motion for temporary injunction.

The next day court opened with the formal argument of the board's motion to dismiss the complaint. Although the result of this motion was a foregone conclusion, the argument is most interesting because it contains a somewhat more colloquial description of the plaintiffs' legal theory. In defense of the complaint, Mr. Zuber stated his position as follows:

> I think that we state in our complaint that the plaintiffs are Negro youngsters; that they are eligible to attend the public schools of the city of New Rochelle; and by the acts of the defendants they are compelled to attend the school which we allege is racially a segregated school; and it is a racially segregated school as a result of the acts of the defendants; and that this is not something that has been spontaneous, but has been something that has been more or less perpetuated over a period of years.
>
> Now, in going further to that, following the *Brown* v. *Board of Education* case, we go on to cite that as a result of this segregated education, that the children are receiving an inferior education, because of the watering down or modification of the curriculum; the inadequacy of the teaching staff; the inadequacy of the physical plant.
>
> Then we go one step further in our complaint. We proceed to allege that not only by the utilization of the neighborhood school policy have the defendants perpetuated this segregated situation, knowing the residential composition of the community, knowing the student population of the Lincoln School, but then they have the audacity to go before the plaintiffs and others of their class and decide to construct another school, at an expenditure of 1.3 million dollars, on the same site.

Judge Kaufman took a 5-minute recess and then overruled the motion to dismiss on the ground that: "The plaintiffs in the present action are clearly entitled to a hearing at which they can attempt to elicit the particular facts and circumstances which they claim render the defendants' conduct unconstitutional."

Judge Kaufman then separated the hearing on the temporary injunction from the trial on the merits, and since ". . . the movant in a motion for a temporary injunction is entitled to have an adjudication one way or another with fairly reasonable dispatch, particularly in a case where constitutional issues are raised," he ordered the hearing to begin immediately. Thus, the school board had been relieved by Judge Kaufman from their agreement to combine the trial on the merits with the hearing on the preliminary injunction. The ultimate merits of the case were no longer before Judge Kaufman, who merely was concerned with the question of whether to afford the plaintiffs any temporary relief before the issues could finally be determined in a full-scale trial.

The Hearing

Mr. Zuber began his case by calling two formal witnesses on the question of the inferiority of the Lincoln school. The first was Hallie May Taylor, a high school graduate, the wife of a postal employee, and the mother of the plaintiff Leslie Taylor. She stated that her daughter Leslie, who was 8 years old, was not presently attending Lincoln school and was receiving private tutoring instead because "I feel that at Lincoln School my child Leslie was not achieving up to her potential, and I want her to have an education at an integrated school."

Mr. Zuber's second witness, William H. Sneed, a school psychologist, stated that he had tested Leslie Taylor and that not only had she scored 136 on her IQ test, but her score would have been even higher had her vocabulary and reading ability not pulled it down. Dr. Sneed testified further that in his opinion Leslie's poor scores in vocabulary and reading could reflect a lack of academic stimulation in the school. At this point Mr. Weiss objected that "putting in testimony of this kind . . . as to the character of the school will only put the court in the position of having to condemn a school system of over 11,000 children." The objection was overruled. Dr. Sneed stated that in his experience 80 to 90 percent of deprived children show this type of development. He added that it is characteristic of segregated schools—schools with an ethnic-religious-nationality preponderance of over 90 percent. On cross-examination he admitted, however, that this kind of lag in vocabulary and reading can also be caused by the child's socioeconomic group and be due mainly to his home environment.

After these two brief witnesses, Mr. Zuber proceeded to present his star witness, Bertha Oden White, a housewife and private tutor. It was she who testified to the crucial element that was missing from Mr. Zuber's complaint—gerrymandering. Mrs. White testified that she had been studying the Lincoln problem since 1948, that she had carefully searched the records of the school board back to 1909, and that she had talked to many longtime residents in the community. She stated that her research showed that in 1930, when the Webster school was built to the northwest of Lincoln, its boundaries were drawn so that they included an all-white area right across the street from the Lincoln school; as Negroes moved into this area the boundaries of

Webster were gradually withdrawn closer and closer to Webster school until Lincoln again had a reasonably regular shape. (See appendix I.) She stated further that students who had been at Lincoln during this period had told her that at the same time the Webster school was opened, the all-white Rochelle Park neighborhood to the east of Lincoln was moved out of the Lincoln zone and into the Mayflower zone. Although this transfer clearly took place, Mrs. White was unable to find any record of such a decision in the board minutes.

The most remarkable thing about Mrs. White's testimony on the issue of gerrymander is that it was hearsay and inadmissible as evidence. Mr. Weiss, although he had objected to the greater part of the plaintiff's testimony up to this point, at no time objected[21] to the hearsay elicited from Mrs. White. Thus, it was properly available for consideration by the judge and indeed was the only evidence introduced on the issue by either side.

The significance, then, of Bertha White's testimony cannot be overestimated. Here instead of the dry syllogism of the complaint we have direct testimony that the board, at least in 1930, had gerrymandered the Lincoln zone so that white students were sent to the new Webster school and to the Mayflower school, leaving the Lincoln school more heavily Negro. Moreover, the unusual shape of the altered Lincoln zone and the failure to note in the minutes the removal of the Rochelle Park area from the Lincoln attendance area were at least evidence that this decision had been made deliberately. Strangely enough, although it is clear that unconstitutional segregation can be accomplished by gerrymandering as well as by State decree, this was the last time that gerrymandering was mentioned in the hearing. No real effort was made to shake Bertha White on cross-examination, or to introduce evidence either contradicting or putting some other interpretation on the facts she stated.

Since then, other possible explanations for these facts have been tendered by New Rochelle residents. The most popular is that when the Webster school was constructed, it was built to serve a rapidly growing area, and it was, therefore, expected that some years would pass before the school would be filled to capacity. Accordingly, to prevent such a modern building from being grossly underused and to relieve some of the crowding in Lincoln, the eastern boundary of Webster was extended to include the children living right across the street from Lincoln. As the Webster school filled up, these boundaries were gradually withdrawn until the boundary between Webster and Lincoln achieved its present location. Unfortunately for this explanation, the location of the boundary lines indicates that not only was an effort made to fill Webster—but to fill it with white students. Another explanation admits that the gerrymander took place in 1930 but states that the wrong was undone in 1934 when the Lincoln-Webster boundary was straightened. Those who take this view contradict Mrs. White's testimony and state that the area wrongly taken from Lincoln had not changed its racial character before it was returned to that zone.[22] There are two answers to this argument. First, no evidence of any kind was introduced in court to indicate that Mrs. White was in any way inaccurate in her testimony; secondly, and more fundamentally, even though the white area was returned to the Lincoln zone, the board's transfer policy prevented the harm from being undone. Under this policy the white residents of the area could and did continue going to Webster.

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[21] A witness is in general permitted to testify only on his own observations, not on facts he was told by others. Here, Mrs. White's only knowledge of which areas along the Webster boundary were white and which were Negro in 1930 came from her conversations with longtime residents. Nor, as she testified, did she have any personal knowledge concerning the removal of the Rochelle Park section from the Lincoln zone at the same time. Thus it was hearsay. Hearsay evidence, however, is not what is called irrelevant and therefore of no probative force. Rather it is what is called incompetent evidence, and is inadmissible only if objection is made to it. The reason for this rule is said to be that hearsay is not truly unreliable; indeed reasonable and prudent men even in their important affairs are quite accustomed to relying upon such evidence. Hearsay is excludable evidence only because it is felt that the party against whom it is introduced should have the right to cross-examine the original sources of this secondhand testimony. Hearsay under certain circumstances can also be removed from consideration by what is known as a motion to strike. In this case, however, no such motion was made.

On the other hand one cannot condemn the school board of the 1930's too severely for its acts. During this entire period school authorities were considerably less sensitive to racial problems than they are today, and the doctrine of "separate but equal" was implanted in the minds of the great majority of Americans.[23]

In addition to testifying on the gerrymander issue, Mrs. White described a study she made in 1948 of the children who lived in the Lincoln area. She found that numerous white children who lived in the Lincoln zone were attending other elementary schools while all the Negro residents were attending Lincoln. It was this survey that was used as the basis of the appeals to the board to maintain a fixed neighborhood school policy and prohibit all transfers. Although Mrs. White never stated as much on the witness stand, the implication could be drawn from her testimony that transfers out of the Lincoln area were given to white children and denied to Negroes. Since the trial, however, many white residents have pointed out that there are other possible explanations for the situation Mrs. White uncovered. First, transfers might have been legally available to either side, but Negroes might have been talked out of transferring by school administrators who suggested that they might not be happy in an overwhelmingly white school. Second, although Negroes might not have been talked out of transferring, white children might have been actively encouraged to transfer. Third, transfers might have been open equally to all students regardless of race, but due to apathy Negroes may not have requested any transfers. Although the majority of New Rochelle residents appear to believe that the last of these possibilities is the case, this does not appear to be so. There are documented cases of Negro residents[24] of the Lincoln area who before 1949 asked that their children be permitted to transfer to other schools but were denied transfer by the Lincoln principal because they "lived in the Lincoln district." There is no record of a white pupil's having been denied transfer during this time.[25]

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[22] Though it was not brought out in court, there is evidence that the change, if any, in the racial composition of the Remington Sickles area (the area removed from Lincoln in 1930 and returned in 1934) was not great, and that area did not become primarily Negro until the 1940's.

[23] To be sure, in 1930 the school board had been reminded of its responsibilities by a letter from three Negro leaders. This letter, referring to the change in the Lincoln district lines, stated, "This is a long step in the direction of [Jim] Crow schools in New Rochelle . . . Jim Crow schools wherever found do not get the consideration white schools do. Less money is spent on them; they are not so well kept up, and the least efficient teachers are assigned to these schools." No answer was made by the board to this letter. The prophecy soon came true. The Lincoln school was allowed to deteriorate both physically and educationally.

No further evidence was given in court, however, to explain the facts revealed by Mrs. White's survey, except for the testimony toward the end of the trial of Sim Joe Smith, the assistant superintendent of schools. Mr. Smith, before the rigid transfer policy was instituted in 1949, had been in charge of approving all transfers, and he clearly knew more than anyone else what the facts were. Unfortunately, his testimony was so unhelpful in this regard that it gave rise to charges of evasion by the judge. Mr. Smith testified that he had jurisdiction over all transfers, but that he had absolutely no idea how many of the students transferring were Negro and how many were white since he did not classify people by race. Even had Mr. Smith been completely straightforward in all of his other answers (and a reading of the transcript makes it clear that he was not), he would have had great difficulty getting anyone in New Rochelle to believe that he pays no attention to race. In any event, no further light was shed upon the board's transfer policy before 1949.

After presenting Mrs. White's testimony on the gerrymandering and the transfer policy, Mr. Zuber called Nolan Fallahay to the stand. Mr. Fallahay, a professor of English at Iona College in New Rochelle and a member of the school board, had been one of the most vocal foes of the plan to rebuild Lincoln. He stated that since he had become a member of the school board in 1955, the racial overbalance in the Lincoln school area had been called to the board's attention again and again, but that the board had taken no action to remedy the situation. He had no doubts about the sincerity of his colleagues on the board of education, but felt that they had not been sufficiently active and decisive in their efforts to solve the Lincoln problem. He stated that in his opinion segregated education is almost inevitably inferior and defined segregation as "a large overbalance of one ethnic, racial, religious, or other type of group contained within a school." On cross-examination, however, Mr. Weiss asked him whether the parochial school met his definition of segregation, and whether he considered the education offered there inferior. Mr. Fallahay dodged the issue by stating that parochial school attendance was not compulsory. This, of course, is not a complete answer, since the State has at least some obligation to make certain that its citizens in nonpublic schools do not receive an inferior education. As testimony later in the case showed, Mr. Fallahay had made his definition of segregation too broad. Had he restricted his charge of inferior education to segregated racial groups of "high visibility," his definition would have been more defensible.

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[24] *E.g.*, Mrs. Thornton Gray and Mrs. Paul Price.

[25] Actually the statement can be put more strongly. No Negro transfer was allowed and no white transfer was refused between 1934 and 1948.

Mr. Zuber's next major witness at the hearing was Marylyn Pierce, the only Negro member of the board of education. She touched on a wide range of topics. One was the insufficiency of the Lincoln physical facilities as evidence of the inferior education offered the plaintiffs. Although a great deal of time was spent by both sides on this subject, it is hard to see how this was much of an issue, since everyone conceded that the Lincoln building was not up to New Rochelle standards. This, in fact, was why the board wished to replace the school. Actually, almost everybody who has examined the facilities states that the condition of the school is not nearly so bad as has been pictured, and certainly no worse than other schools in New Rochelle were at the time of their replacement. It is antiquated rather than dilapidated, and many New England towns might consider it palatial.

In addition, Mrs. Pierce charged that not just the gerrymandering of the Lincoln zone, but the very construction of the Webster school in 1930 was an act of discrimination toward the Negro residents of the Lincoln area. She stated, "I do believe and it is my firm conviction that if it were not for the fact that the Lincoln school area was increasingly becoming a Negro area [the school board] would have enlarged the Lincoln school to accomodate the Webster school just as [it has] in other school situations." This testimony, however, was not buttressed by any specific factual evidence and stood merely as the personal opinion of the witness.

Next, Mrs. Pierce went through the logical steps that formed the basis of Mr. Zuber's case. She believed that Lincoln school was segregated; that this racial segregation would be continued if the new

Lincoln school were built; and that this segregation had resulted and would result from the acts of the board of education. Lastly, Mrs. Pierce stated, "I have not once heard the board say, 'Let us meet. Let us set up a committee to study integration in New Rochelle and how these things can be implemented.' " She admitted, however, that the Lincoln problem had often been brought before the board and discussed, and that numerous studies of the problem had been made for the board.

Just after Mrs. Pierce's testimony was concluded, Mr. Weiss and Judge Kaufman engaged in a colloquy which should have convinced Mr. Weiss that, although the issue at this hearing on the preliminary injunction was relatively simple, the ultimate merits of the case involved some very complex problems. Mr. Weiss said:

> Mustn't it be obvious at this time to the court, that what has happened here is this: that if there is a 94 percent colored school it flows from the fact that colored people have moved in there and we believe that a colored child has just as much right to go to a neighborhood school that is convenient for that child, as a white child has.

This view of the law would have been appropriate had the plaintiff been alleging that the Negro children were prevented from attending their neighborhood school. This, however, was not the case here. The question here was: Could the board of education compel the Lincoln children to attend that racially unbalanced school? Judge Kaufman's reply stated the issue in the broadest terms:

> Let's assume that the district has become all colored . . . The question is whether, knowing that, there is an obligation on the part of the board to move in some direction to see that there is some dispersal of the children . . . whether the board may continue under the guise of a neighborhood school policy and maintain a status quo. That is the problem.

Judge Kaufman then showed a mastery of understatement by adding, "I suggest that in this area we are dealing with a comparatively new body of law." The issue as he phrased it was more than comparatively new; it was completely new, since no previous case had even suggested that a board of education might have a constitutional duty to abandon school zoning where, through no fault of the public authorities, an area had become primarily Negro. It is a difficult question whether *Brown* v. *Board of Education* applies to mere racial imbalance—sometimes called de facto segregation—that is, to a case in which a neighborhood school policy, without gerrymandering or without other misconduct of the school authorities, has led to a preponderantly Negro school. Some of the Supreme Court's language in *Brown* can apply to this type of segregation as well as to that before the Court, since this type of imbalance may also "generate a feeling of inferiority as to [the Negro children's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Thus, if one believes that the basis of the *Brown* decision was the Court's finding that separate schools were unconstitutional simply because they bred a feeling of inferiority in the Negro, one must also believe that the neighborhood school policy, must also be constitutional if it breeds the same feeling of inferiority.

There are, however, problems with this analysis of *Brown.* First of all, it was obvious in 1954 that under the entire exploitive social system of the South, separate schools helped breed a feeling of inferiority in the Negro—and, to a large extent, school segregation was designed for just this purpose. Although there is a growing body of evidence to indicate that racial imbalance in itself is harmful to the Negro even in the setting of the North, it is less clear. If the Negro is entitled only to the equal protection of the law, he may be entitled to no more than the neighborhood school policy as applied to his neighborhood, provided the authorities do not allow the quality of education there to deteriorate. Moreover, it very well may be that no feeling of inferiority on the ground of race is caused by segregation not created deliberately by the State, because the Negro pupil attending a racially unbalanced school can see other Negroes who live in better balanced areas attending completely integrated schools. The student may then realize that it is not his race but merely his neighborhood which has determined his school.

There are other factors, too, that may cause a Negro child to feel inferior because of his race, factors which many educators feel are more important than racially unbalanced classrooms. One is the choice of textbooks. Even in integrated classes, Negroes may suffer through use of textbooks which show members of their race in menial positions only. Most textbooks do not even mention the existence of Negroes in the United States, and show pictures of all-white classrooms, all-white working forces, and all-white social gatherings only. Nor may any of the important figures studied in history, civics, science, or any other field be Negro. Admittedly, a large part of the blame for this situation is shared by textbook publishers, who must sell books in the South, and by middle-class white teachers who know nothing of the achievements of the Negro. On the other hand, this would not excuse boards of education from any constitutional duty to prevent feelings of inferiority.

It is, of course, possible that the entire "inferiority" theory has no constitutional dimension at all, and that the Supreme Court in its segregation decision was only buttressing its main argument with its findings concerning feelings of inferiority. Its main argument would simply be that racial classification by the State is a completely unreasonable means of dividing its citizens; that although for reasonable purposes citizens of different age, sex, educational background, and residence may be treated differently, in most situations, including public education, race is not a permissible standard. As the Supreme Court said in *Hirabauashi* v. *United States*,[26] "Distinctions between citizens solely on the basis of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." This view of *Brown* v. *Board of Education* is supported by the Supreme Court's subsequent decisions outlawing segregation in parks, buses, and golf courses.[27]

It is strange that during the entire discussion between Mr. Weiss and the court concerning the legality of segregation not caused by the board, no mention was made of the fact that the beginnings of an easier ground for decision of the motion for preliminary injunction (and for any final trial on the merits) was already in the record. If, as was indicated by Mrs. White's testimony, the school board had gerrymandered the Lincoln district, the problem of racial imbalance occurring through no fault of the board might not even be an issue in the case.

Mr. Zuber, who had taken no part in this discussion, then called his next witness, Dan W. Dodson, one of the Nation's leading experts in human relations and head of the team which had previously submitted to the board of education what is known as the Dodson report. Dr. Dodson testified that in 1959, at the request of the board of education, he had, together with a team of experts, undertaken a study of the racial imbalance in the Lincoln school. After making a complete study, he had proposed an interdependent set of recommendations. These included the rebuilding of Lincoln as a much larger school on the same site, the closing of the Washington school, and a major redistricting.

The most interesting fact about Dr. Dodson's report is that, despite his eminence and the high quality of his analysis of the problem, almost nobody in New Rochelle on any side of the Lincoln issue believes that his recommendation was a good one. Its great disadvantage was that the school proposed by the Dodson report would have opened with at least a 70 percent Negro enrollment.[28] As previously mentioned, New Rochelle had had an unfortunate experience with this type of racial balance in 1949, when by revoking all transfers it had hoped to cause racial integration at Lincoln. The great majority of the white children, however, rather than be outnumbered 2 to 1 by Negroes, chose to avoid entering the Lincoln school and either enrolled in parochial or other private schools, or moved out of the area. It is not important whether there is, in fact, a specific Negro preponderance beyond which white children will leave a school, since the overwhelming majority in New Rochelle believed that this was so, and would have acted accordingly. Admittedly, as Dr. Dodson stated in his report, "There is no ideal solution to the problem." Almost everyone in New Rochelle, however, felt that his recommendation was far short of ideal and involved far too great a risk of leaving New Rochelle with a newer, larger, and more expensive segregated school than it already had. Dr. Dodson now states that, if he had it to do over again, he would have recommended building a school in a sparsely settled area and busing large numbers of children to it from all parts of the city.

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[26] 320 U.S. 81,100 (1943).

[27] *Muir* v. *Louisville Park Theatrical Ass'n.*, 347 U.S. 971 (1955), 1*Race Rel. L. Rep.* 14 (1956); *Mayor* v. *Dawson*, 350 U.S. 877 (1955), 1 *Race Rel. L. Rep.* 15 (1956); *Holmes* v. *City of Atlanta*, 350 U.S. 879 (1955), 1 *Race Rel. L. Rep.* 14 (1956); *Gayle* v. *Browder*, 352 U.S. 903 (1956), 1 *Race Rel. L. Rep.* 1023 (1956); *New Orleans City Park Improvement Ass'n.* v. *Detiege*, 358 U.S. 54 (1958).

[28] By 1962 the area it would have served has already become nearly 80 percent Negro.

The cross-examination of Dr. Dodson, however, instead of concentrating on the defects of his solution, focused on the idea that nothing in the present plans precluded the school board from carrying out his recommendation by later adding to the size of the proposed new Lincoln school, and then shutting down Washington and rezoning. In this case the board's decision to rebuild on the site of Lincoln might be a step in the direction of carrying out Dr. Dodson's recommendation. During this line of argument, Judge Kaufman interrupted. "I'm sure that the position of the plaintiffs is that if the board intends to carry out the program and, if the Lincoln site is merely the first step, then there can't be any problem." Mr. Weiss then relied on the legalistic notion that "no public body can bind another, a new body;" that no one could be sure the board's plan might not prove to be the first step in implementing the Dodson proposal. It is difficult to see why Mr. Weiss chose this line of argument. Nobody in New Rochelle contemplated for a moment that the new Lincoln school would be the first step in implementing the Dodson proposal. First it would have been an expensive as well as illogical method; and secondly, nobody on the school board had favored the Dodson proposal to begin with.

Mr. Weiss also questioned Dr. Dodson as to whether rebuilding the Lincoln school to have a capacity of only 400 students could be a step toward integration, since it would distribute 100 Lincoln students to more racially balanced schools. Dr. Dodson's reply, that this depended upon which children were to be distributed, pointed out a curious failure in the board's planning. Some members of the board had assumed that the distribution would come from the overwhelmingly Negro Hartley Houses.[29] Others had assumed that the 100 students would be removed from the Lincoln school by the simple process of rezoning to send those on the fringes of the Lincoln area to nearby schools, even though this method might have reduced further the small percentage of white children in Lincoln. In fact, the board had not really thought about this problem.

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[29] See *supra*, note 12.

Dr. Dodson was followed on the witness stand by another educational expert, Theron A. Johnson, administrator of the Education Practices Act for the New York State Education Department and head of the department's Intercultural Relations Division. Mr. Johnson testified that in late 1956, at the request of a number of interested citizens, the school board had asked the State education department to send an expert to New Rochelle to advise it on the question of rebuilding Lincoln, then being debated by the board. Mr. Johnson was selected to make the investigation and, in the company of Dr. Harold Lott, a distinguished Negro educator, visited New Rochelle. After 2 days of investigation, they both met with the board and reported their preliminary findings, approving of the rebuilding of Lincoln. On his return to his office, Mr. Johnson wrote in his preliminary report:

> There is at this time, no complete solution to the situation . . . In all but three of the elementary schools there is racial integration. No presently known techniques can now create complete integration of the Lincoln School district, one of these three, and still retain educational values. This is the regrettable but inescapable conclusion of our study.
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> There has been thoughtful concern and work by many community organizations, by interested citizens, by the Superintendent and by the Board of Education. This is to be commended.

The school board shortly thereafter proposed the rebuilding of Lincoln as part of their 1957 referendum. Then, in March, 1 week before the registration for the referendum, the board received Mr. Johnson's final report. He had, as he stated, "refined" his thinking. Now his report was sharply critical of the board's inability to remedy a segregated school, and suggested the postponement of the referendum for further study. The board president, Frederic W. Davidson, replied to this criticism by writing to Mr. Johnson's superior, the Commissioner of Education, charging that Mr. Johnson's report was unfair to the board. More specifically, Mr. Davidson charged that the suggestion of a delay in the referendum was irresponsible because it was made without consultation with the board, after all of the preparatory work for the referendum had been done, and at a time when New Rochelle badly needed the extra classroom space. Mr. Davidson went on to state that the request for further study:

> . . . ignores the fact that this board has, in connection with developing its school building program, already spent upwards of a year in concentrated study of the Lincoln situation and its ramifications, in the course of which a number of special studies have been made.
>
> It finally arrived at the same conclusion that Mr. Johnson did in his report to us last December . . .

Lastly, Mr. Davidson charged that copies of the report had been leaked in advance of its submission to the board to organizations opposing the rebuilding of Lincoln. The Commissioner of Education then officially withdrew the Johnson report.

In addition to his story concerning his report and the board's reaction to it, Mr. Johnson contributed some testimony shedding light on one of the crucial questions confronting the court. The board had argued both in court and during the referendum campaign that if Lincoln were a segregated school, so was Columbus with its preponderance of Italian-Americans, and Roosevelt, Ward, and Davis which were predominantly Jewish. The board maintained, therefore, that nothing was really very wrong in the Lincoln imbalance. Mr. Johnson, however, defined segregation only in terms of Negroes.[30] A school was segregated, he said, if it had a very high percentage of Negroes, say, more than 80 percent, and even more important, if it was commonly known within the community as a Negro school. Both of these definitions, of course, fitted Lincoln perfectly. Mr. Johnson went on to state that a characteristic of a segregated school is that "the achievement of youngsters is reflected in lowering motivation and lowering achievement." On cross-examination he elaborated on the question:

> Mr. Weiss. This adverse effect that you mentioned, is that true only of Negroes?
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> Mr. Johnson. The research shows this to be true, yes, of Negroes only . . .
>
> Mr. Weiss. If the incidence is only with respect to a Negro then there must be something inherent in a Negro.
>
> Mr. Johnson. No, Mr. Weiss, that is not correct.
>
> Mr. Weiss. Well, I would like you to elaborate on that.
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> Mr. Johnson. Yes, there are several factors that operate: [There are] schools in the Northern U.S. or in New York which tend to be designated as Negro schools. In past years the evidence has been fairly constant that facilities are lowered, teacher turnover is higher, etc. . . . Even when these factors are constant you have the operation of a psychological phenomenon that kids designated as second class or as inferior or low in status set out psychologically to prove this to be true and this is the result. And even when you take out the factor of sociostatus and economic status this phenomenon still operates and this is the crux of it . . . It is a psychological phenomenon we know that intelligence is not a function of race, there are plently of studies to show that. The Negroes are not less intelligent than whites or more intelligent either. They are stupid, average and wise as the rest of us are, or like anyone else is. It is this placement of a person in a position which is truly and totally recognized as an inferior position. This is the history of the Negro in America.

Here, then, was evidence which would justify the board of education in being color conscious. If as a matter of psychological and educational fact, a "Negro" school—even with fine teachers and a good curriculum—has serious disadvantages not present in a predominantly Italian or Jewish school, the board might be justified in taking special steps to prevent the continuance of a "Negro" school and might even allow its students special privileges such as free transfer out of the attendance zone. This is not to say, of course, that a school board would have a constitutional duty to do this. Before venturing such a proposition of law, a court might wish a great deal more expert testimony and many carefully documented studies.[31] In any event, in this case the plaintiffs were charging more than the intangible psychological effects of segregation; they were also charging inferior teaching and curriculum. For this reason, Mr. Zuber called as the last of the plaintiff's witnesses Dr. Herbert C. Clish, then the New Rochelle superintendent of schools.

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[30] Subsequently, he modified this definition to include certain other minority groups of "high visibility"—Puerto Ricans in New York and Mexicans in the Southwest.

In the long examination of Dr. Clish and from the many exhibits submitted in connection with his testimony, one fact stands out. Despite a great deal of effort, the plaintiffs were unable to show that at the time of the hearing, the Lincoln school was in any measurable way inferior to the remainder of the schools in New Rochelle.[32] True, the average reading and arithmetic scores of the Lincoln children were the lowest in the city.[33] On the other hand, their preparation before entering school was the lowest, too.[34] Moreover, although many residents of New Rochelle state that before 1949, and even somewhat after, the Lincoln teaching staff and curriculum were the least adequate of any in the city, at the time of the litigation the Lincoln staff did not suffer from any greater turnover, lesser training, or other measurable inferiority.

In addition to the questions concerning the quality of education at the Lincoln school, Dr. Clish testified at some length on the efforts made to pass the 1960 referendum to rebuild Lincoln. First, Dr. Clish was questioned about the activities of two of his principals, Charles Spacht, of Mayflower, and Dr. Barbara Mason, of Roosevelt. Mr. Spacht had sent a letter to the parents in his school area urging the passage of the referendum on the ground that, "We are proud that Mayflower as now operated is a well-integrated school, 29 percent Negro. Do you wish this good integration to be changed?" Dr. Mason, at the time the only Negro school principal in the State of New York, had also come out in favor of the referendum on the ground that the Negroes in the Lincoln area did not have the socioeconomic background to compete with the students in the north end of town, that sending them to other central schools would disturb the integrated balances there, and that granting

> . . . Lincoln School pupils' selection of periphery schools would result in a situation in which only Lincoln School pupils (Negro) would be attending schools other than those nearest their home . . . If attending a school which

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[31] James Bryant Conant, in *Slums and Suburbs* (McGraw-Hill, 1961), argues (pp. 30–31) that "The more one considers the matter, the more one is convinced that children should not be manipulated for the purpose of seating Negro children in white schools or vice versa . . . I think it would be far better for those who are agitating for the deliberate mixing of children to accept de facto segregated schools as a consequence of a present housing situation and to work for the improvement of slum schools whether Negro or white." See also App. E.

[32] Many Negroes in New Rochelle state that nonetheless "there was something lacking in the education at Lincoln," and cite cases of remarkable improvement by students who went from Lincoln either to parochial schools or other elementary schools in New Rochelle.

[33] See app. B, E.

[34] See app. D.

> serves a Negro neighborhood contributes to inferiority feelings of pupils, how much more would such a method of placement make these Negroes feel inferior.

Dr. Clish, although he had had full knowledge of these racial arguments, had made no effort to prevent their use by his subordinates and once even went so far as to state to a group of north end parents advocating free transfer for the Lincoln students:

> . . . Well, if you are really that sincere, until there is some further action taken, if you want to send your children to Lincoln I will ask the board to allow me to send a like number of Lincoln children up to take their places.

The last major part of Dr. Clish's testimony concerned an advertisement[35] prepared with his aid by a committee for the passage of the 1960 Lincoln referendum. This advertisement listed all the elementary school PTA executive boards as favoring the reconstruction of the Lincoln school, despite the fact that the Trinity school PTA president had refused permission to mention that executive board's approval. The advertisement also stated that the Lincoln PTA wanted a new school, whereas no vote of the membership had been taken and only the executive committee of its PTA had come out in favor of the referendum. Lastly, the ad went on to state that if the referendum were turned down, the board of education would be able to and might finance the school by the more expensive means of 5-year bonds. The testimony of Dr. Clish was then concluded without cross-examination by the defendant's attorney, and the plaintiff rested his case for a preliminary injunction.

At this time the plaintiffs had presented the court with the following picture, which, although it might be contradicted by other testimony, seemed sufficient to make out a prima facie case for a temporary injunction. The Lincoln school was heavily Negro. In the past, in 1930, its attendance zone had been gerrymandered for the obvious purpose of keeping the Negroes in the school while removing white students. Until 1949, when the Lincoln school was 100 percent Negro, white pupils living in the Lincoln zone had been allowed to transfer to other schools. Although it is impossible to determine how much fault the school bore and how much was due to the Negroes' home environment, the performance of the students in the Lincoln school was lower on the average than that of students in any other school. Moreover, expert testimony indicated that an overwhelmingly Negro school was in itself injurious to the education of its students. The plaintiffs' case also showed that the board of education had been alerted to the evil of the racial imbalance in Lincoln, had commissioned numerous surveys and listened to a great deal of argument on ways of eliminating this overbalance, but had done essentially nothing. The board had proposed rebuilding the Lincoln school with a slightly smaller capacity, which might well have had the effect of making it an even more overwhelmingly Negro school and would certainly have done nothing to diminish the imbalance. Lastly, in its campaign to secure authorization to build this new school, it had allowed frankly racial arguments to be made, the thrust of which had indicated that the presence of Lincoln students, at least in some part because of their race, would not be beneficial in other schools.

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[35] See app. G.

Thus, the evidence presented by the plaintiffs raised at least a strong suspicion that they could show in a final trial on the merits—if they had not done so already—that the school board over the years had been indifferent to the educational needs of a racial minority, that at least in the past its actions had accentuated the racial imbalance in Lincoln, and that in recent years it had done nothing to improve the situation. The plaintiffs therefore argued that, unless the defendant school board could meet these charges, the preliminary injunction should be issued.

After the denial of Mr. Weiss' routine motion to dismiss the plaintiff's case, the defense began its case to show why the request for a preliminary injunction should be denied. The board's first witness was Kenneth Low, who, though no longer on the board, had been a member for 10 years and president at the time of the most recent decision to rebuild Lincoln. His original appointment to the board had been a result of his fine work in race relations as a member and the chairman of the Mayor's Interracial Committee and as the chairman of its successor, the Council for Unity. In the latter capacity he had taken the lead in persuading the 1949 board to prevent the transfer of white students out of the Lincoln school in the hope of achieving integration there. Mr. Low was also a member of the Urban League and the chairman of the Westchester County Council of the New York State Commission Against Discrimination.

Kenneth Low's testimony on the Lincoln matter was essentially this: When the board proposed in 1959 to rebuild the Lincoln school, it had picked the best of several unsatisfactory proposals. The whole board, as well as he himself, had been quite unhappy with the racial imbalance at Lincoln and had studied many means of remedying it. Unfortunately, it was a situation where no solution thought of was satisfactory and, finally, the board had chosen the present one. First, no other site was available in the Lincoln area that would have resulted in any lower percentage of Negro pupils than at present. Furthermore, no method of drawing the boundary lines around the present school would have helped in any way, since the whole area surrounding the Lincoln zone was predominantly Negro. The board—or at least seven of its nine members—felt that closing Lincoln and sending the students to the surrounding schools which had vacant seats would have been practicable from the point of view of transportation, but would have had a most unfortunate effect: It would have so increased the Negro population of the Washington school and possibly of the Mayflower school, that, the white parents in those districts either would have moved out or registered their children in parochial or other private schools. The board felt that the experience of 1949 would be repeated on a larger scale and that rather than having one racially unbalanced school, the school board would have soon had two others.

Mr. Low testified that in his opinion there was a similar fault in the recommendation of the Dodson report that a larger school be built on the Lincoln site to accommodate the joint populations of the Lincoln and Washington schools. This school, Mr. Low said, would have been at least 70-percent Negro and would not have remained that well integrated for long. The community would thus have found that it had gone to trouble and expense to make things worse. Nor, Mr. Low felt, would busing Lincoln children to distant schools have been practical. The most important reason for this was the State law requiring any school board which provided transportation for some elementary school children [36] to provide or pay for similar transportation for all such children, and for all parochial and private school children as well. New Rochelle having a large parochial school population could not afford to transport its parochial school students. The city was then near its tax limit, and the board was already having to balance the demands for higher teachers' salaries against hiring needed guidance personnel, and so forth. Next, Mr. Low rejected the idea of permissive transfer for students in the Lincoln district for several reasons. First, permissive transfer plans are difficult to administer since they require up-to-date figures on the number of vacancies in each school, and complaints and difficulties invariably arise in ascertaining the number of seats available for the transferees. Moreover, he felt that if transfers were allowed out of the Lincoln district, the white children would be among the first to leave and a situation like that of 1949 would result, making the school's racial imbalance even worse than its present 94 percent. He said that in his opinion the school board had no moral or constitutional right to select one school and allow free transfer because of its heavy Negro concentration, while at the same time denying this right where large concentrations of Jewish or Italian children were involved. This, Mr. Low felt, was not being properly colorblind.

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[36] Exclusive of certain handicapped children.

The last of the possible alternatives to rebuilding the Lincoln school was the construction of a k–3 school in the Lincoln area, with fourth- through sixth-graders being sent to nearby schools. This solution also had disadvantages. Not only did it fail to improve the racial imbalance of the Lincoln area pupils through the third grade, but it involved the danger that the fourth-, fifth-, and sixth-graders sent to the nearby schools might tip the racial balance there. Moreover, the past superintendent of schools, Donald J. Phillips, as well as Dr. Clish, had opposed the k–3 solution on the ground that such a school was not as sound educationally as a k–6 school.

Despite all this, Mr. Low said that he felt that the k–3 proposal was the best solution available and that he had advocated the adoption of this plan. He could understand, however, why the majority of the school board, in good faith, had favored replacing the Lincoln school as a k–6 school with its present 500-pupil capacity. It was at this time, Mr. Low said, that the compromise was suggested whereby the Lincoln school would be replaced by a school with a capacity of only 400. No one contended that the removal of 100 pupils would make Lincoln a less segregated school any more than the k–3 would. Rather, it was felt that at least the 100 pupils who would receive an integrated education might benefit. The plan was not completely thought out, however, and there was no decision as to exactly which of the Lincoln pupils would be sent to other schools.

Not only did all the alternatives to the board's plan have obvious disadvantages, Mr. Low went on, but there were positive reasons to rebuild the Lincoln school. First, the board was influenced in its conclusion by an alleged poll taken by the Lincoln school PTA which showed that 87 percent of the Lincoln parents wanted the new school. Second, although parts of the Lincoln zone contain well-maintained private homes, the area adjacent to the school can only be called a crime-ridden slum. The board hoped that this area would be redeveloped and that middle-income housing would be built there which might change its residential character. The State authorities, however, had ruled that they would not approve middle-income housing unless a modern school were erected nearby.

During Mr. Low's testimony he was questioned extensively by Judge Kaufman, who, in essence, took the view that there is no such thing as an insoluble problem.

Judge KAUFMAN. . . . What troubles me is, in effect you are saying you maintain the status quo because you simply can't find an answer to it, and it is hard for me to understand how conscientious members of the board can't find an answer to this, where the answers have been found in other communities?

Mr. LOW. . . . we have done our best on this subject, and I assure you that I have been deeply concerned with the rights of minorities for many, many years, and I would not consciously do anything that would injure them, and I would do everything possible to help them. But I am not going to violate what I consider to be basic constitutional principles, and the mere fact that this happens to be a badly racially imbalanced school is not due to any act of the Board of Education. It is a residential condition. And I may add that the Board of Education, before we took this action, supported in the State legislature the proposed bills for outlawing discrimination in residential patterns, in other words, the housing bills.

JUDGE KAUFMAN. . . . I understand the significance of your testimony, you are saying that you have wrestled with the problem; that you and other members of the board are fully conscious of it, and you are very sympathetic to it and you don't like to perpetuate this bad racial imbalance, as you call it. Yet, on the other hand, you say you could find no practical solution. The fact of the matter is, am I correct in saying that none has ever been tried, and it is really based on your judgment that you couldn't cure it by doing these things? . . . I think [the Dodson recommendation] would have been a step in the right direction. And we all agree here there are no ideal solutions, but we all agreed, I think, that we must make some start.

Mr. Low. Now, I consider that a start in the wrong direction.

On cross-examination, Mr. Zuber read into the record part of a letter written by Mr. Low in 1949, which said, "Every effort should be made, whether by redistricting or abandoning the school or by building a new school in a different location, to prevent the existence in New Rochelle of what is in effect a segregated school." In answer to Mr. Zuber's charge that he had changed his position completely, Mr. Low stated:

> At that time I was hopeful that something could be done about this which upon long and careful study I found was not a reasonable solution to the problem. All of the proposals that I made in that letter were most carefully studied by our board.

In certain other areas of cross-examination, however, Mr. Low did not fare so well. He was questioned severely on the misleading and threatening tone of that part of the advertisement (app. G) which stated that the school board could rebuild the Lincoln school in a more expensive manner if the referendum were defeated; and on the problem of how middle-income housing would be put into the overwhelmingly Negro Lincoln area without its also becoming overwhelmingly Negro. Apparently the board had not thought through this second matter, because the rezoning designed to effect the removal of the 100 Lincoln pupils might detach the areas most suitable for integrated middle-income housing.

Although he may have failed to think through the board's proposals, Mr. Low refuted any charge of deliberate bias on his or the board's part not only by pointing to his own advocacy of the k–3 plan and to his personal record of membership and activity in groups against bias, but also by showing a number of concrete decisions made by the board of education which had had the effect of preventing racial imbalance in areas other than Lincoln. For instance, a consultant's report had suggested the building of an additional high school to serve New Rochelle's rapidly growing north end. He testified that this recommendation was rejected because white students would be syphoned off to the northern high school making the southern heavily Negro. Another consultant's recommendation that a third junior high school should be built in the north end of the city was rejected for the same reason. The board felt that if the city had one southern, one central, and one northern junior high school, the central school would inevitably have a large preponderance of Negroes. In both of these cases, Mr. Low said, the recommendation would have been accepted but for the board's active desire to prevent a racially unbalanced school. Moreover, Mr. Low suggested that, while it was true that the board had been unable to solve the Lincoln problem, it had taken other action which at least indicated that it was not trying to avoid improving things. For instance, it had straightened out the Lincoln boundary line to send some 27 Negroes from Lincoln school into nearby Washington.

At the conclusion of Mr. Low's testimony, the defense presented a number of brief witnesses: Lee Kahan and Dr. Joseph Robitaille, past and present principals, respectively, of the Lincoln school; Dr. Barbara Mason, principal of the Roosevelt school; Dr. Joseph Halliwell, principal of the Webster school; Dr. Edward J. McCleary,[37] Superintendent of Schools of East Meadows, Long Island; and Sim Joe Smith, Assistant Superintendent of Schools in New Rochelle. These witnesses covered briefly and in no great detail a host of specific questions—teacher turnover in the Lincoln school, inferior education in the Lincoln school, the campaigning during the 1960 referendum, definitions and effects of segregation, and reasons for the neighborhood school policy.

Although none of this testimony was in any way conclusive, or even important, what is probably the most important single event of the entire litigation took place during this parade of witnesses. Julius Weiss stipulated with Paul Zuber that what had up to this point been merely the hearing on the motion for preliminary injunction should now be considered as the final trial on the merits. For a variety of reasons, Mr. Weiss' decision is difficult to comprehend. As Mr. Weiss had pointed out to Judge Kaufman before the hearing, the school board had by no means had adequate time to prepare its case. None of the usual pretrial methods of discovery, deposition, interrogatories, or pretrial conferences had been used to refine the issues and to ferret out expert testimony. None of the complex questions involving the present effect of the 1930 gerrymander or the pre-1949 transfer rule on the Lincoln school had been investigated. The records of the school system, while replete with relevant data, were not in usable form. Again and again the hearing had been inconvenienced because the school staff, working overtime, had been unable to come up with information on time. An interval before the trial on the merits would have provided time to go into the questions raised about the quality of education at Lincoln, nonintegrated education in general, and the history of the Lincoln district. Moreover, this decision of counsel deprived the board of the full value of its crucial expert witness on the question of the effects of racial imbalance. This witness, Prof. Henry Garret, was not available at the time of the hearing to testify in person in court.[38]

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[37] It is difficult to determine why Dr. McCleary was called to the stand. His direct examination covered only about three pages in the record and was concerned with the standards he used in setting up neighborhood schools. On cross-examination he stated that the heaviest concentration of Negroes in any school in East Meadows, where he had served for the past 25 years, was less than 1 percent.

Most important of all, by agreeing to turn the hearing on the preliminary injunction into a trial on the merits of the case, the school board had forfeited its right to have a different judge make the decision on the merits. This decision was completely inconsistent with the subsequent charges by board members that Judge Kaufman's unfairness and bias against the board had been revealed from the very beginning of the hearing. Moreover, aside from any possible bias, it was clear from the judge's questioning of witnesses and handling of objections that he disagreed completely with Mr. Weiss's whole theory of the case, and was at least leaning against the school board on the decision. Mr. Weiss has since stated, "It was inconceivable to me that the judge could decide against us on this record."

Mr. Weiss' confidence was further indicated by his decision to submit the testimony of most of his major witnesses by stipulation and affidavit instead of through court appearance.[39] This decision was made despite Judge Kaufman's warning that he could not consider this evidence entitled to as much weight as that of witnesses appearing before him in person and subject to cross-examination. Thus, the testimony of Irving Zwiebelson, the chief psychologist of the New Rochelle school system, another of the board's expert witnesses on the effects of racial imbalance on Negro students, was presented in such a manner as to have the least possible impact.

It should be noted that Mr. Zuber's approval was required for the stipulation that the preliminary injunction hearing be considered the final trial on the merits. He consented for two reasons. First, because the essence of his case was already in the record and the board had put in no real defense. Mr. Zuber was also aware that the delay of seeking a final trial would have prevented his clients from attending an integrated school for another year.[40]

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[38] His testimony had to be submitted by affidavit, a far less satisfactory method.

[39] His stipulation that the testimony of the other majority board members would be the same as that of Mr. Low is defensible on the ground that in fact some of them, at least, would not have been as sympathetic witnesses as Mr. Low. On the other hand, their presence in the courtroom as spectators perhaps indicated to the judge that this was the reason for keeping them off the stand. Moreover, a certain amount of ill-feeling in the community was generated by the fact that although various members of the lower echelon of the school administration were called into court to testify, most of the real decision-makers escaped this ordeal.

After all the evidence had been presented in what was now the final trial on the merits, both sides argued the case to the court. Mr. Zuber abandoned the relative simplicity of his previous argument. No longer did he argue merely that the Lincoln school was segregated because it was overwhelmingly Negro; that the school board deliberately required Negro students in the zone to go there; and therefore that the school board was guilty of deliberate segregation. Now Mr. Zuber examined the crucial question of intent, and attempted to draw from the evidence the inference that the preceding boards of education had deliberately made Lincoln school an all-Negro school, with the intention of confining as many Negroes as possible in that school, and that the present school board had, without reason or excuse, failed to do anything to remedy that segregation.

Mr. Weiss for the defendant put forth a number of reasons for deciding in favor of the board. The plaintiffs, he stated, had failed to prove the allegations of their complaint; second, the mere inferiority of one school as opposed to another does not raise a constitutional question; third, New York State law allows the commissioner of education to step in to cure any educational or other defect, and since the plaintiffs in this case had elected to seek their remedy before the commissioner, they should be bound to accept his decision. Last, Mr. Weiss argued that the issues in this case involved a question of policy—that is, the neighborhood school policy—and that, "Obviously courts may not review policy. Policies and review of policies is just the reverse of the judicial process. Judicial process judges an event when it is past; policy looks to the future." In short, the major substance of Mr. Weiss's closing argument involved the duty of the courts where an all-Negro school had come into existence through no fault of the board of education. He maintained that in this situation a school board had no duty to take action. Indeed, he protested that his expert testimony by affidavit indicated that an all-Negro school was not necessarily inferior in any way to an all-white one and that, therefore, so long as the school authorities had not deliberately caused the segregation, there was no violation of constitutional law. As for the evidence of gerrymandering, Mr. Weiss stated, "There is no claim here that we gerrymandered these districts."

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[40] It might also be asked why he approved the allowance of the defendant's affidavits into evidence and thus deprived himself of the opportunity to bring out possibly damaging facts on cross-examination. There appear to be three answers to this. First, Mr. Zuber was quite sure at this time that he had already won the case, so long as his initial proof of gerrymandering had not been refuted in any way. Second, he realized that the very fact that the testimony by affidavit could not be tested by cross-examination would cause the judge to give it much less weight than testimony which had been subjected to this type of test. Third, Mr. Zuber was following a policy of being completely agreeable—whenever it was not too much to his disadvantage—and of speeding the proceedings along. These factors, while certainly not evidence in a case, tend to convince a judge of the reasonableness of one's case and have the psychological effect of disposing him favorably to one's cause. In all of the above reasoning it seems that Mr. Zuber was eminently correct.

The Decision

On January 24, 1961, after the briefs had been filed and approximately 7 weeks after the trial had ended, Judge Kaufman handed down his decision against the school board. It cannot be denied that he had attempted in every way to prevent the trial from reaching this stage. He stated in his opinion:[41]

> Litigation is an unsatisfactory way to resolve issues such as have been presented here. It is costly, time consuming—causing further delays in the implementation of constitutional rights—and further inflames the emotions of the partisans.

Practicing what he preached, the judge had on four or five occasions during the trial invited counsel for both sides into his chambers and tried to bring about a settlement. On each occasion he stated that this type of matter should not have to be resolved by the courts, that there were methods of compromise, and that if necessary he, personally, would act as a mediator. On each of these occasions his attempts were rebuffed by the school board, while Mr. Zuber, although not committing himself to any specific compromise, indicated that he was prepared to sit down and talk. In a litigation between two private parties, this persistence by a judge in attempting to arrange a settlement would be most unusual, and perhaps improper. Judge Kaufman, however, probably felt that a great deal more was at stake here than in the usual private suit, that community relations would be far better served by a negotiated settlement than if one side or the other won. The school board, on the other hand, spurned all of these offers. It appears that there were three major reasons for the school board's adamancy. First, some members believed that Judge Kaufman was not sufficiently impartial to act as a mediator (it is difficult on this premise to see why they felt better off with him as the judge); second, some felt so strongly the rectitude of their position that they wanted vindication and approval by a court. Finally, some were so angry with Mr. Zuber for his public conduct before the trial that this emotion alone would have prevented them from making any conciliatory gestures.

The judge did not merely content himself with attempting to bring about conciliation in his chambers. On a number of occasions in open court he had suggested specific settlements. When Kenneth Low testified that the 400-pupil school which the board had tentatively decided to build would have permitted the dispersal of 100 students, the judge futilely attempted to convince Mr. Weiss that a settlement might be worked out through an agreement to disperse those 100 students immediately. On another occasion, when Mr. Weiss suggested that the plan to rebuild the Lincoln school might be the first step toward the implementation of the Dodson proposal, the judge again tried to propose a settlement on this basis. In both of these cases his attempts were rebuffed by the defendants.

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[41] 191 F. Supp. at 197, 6 *Race Rel. L. Rep.* at 104.

Although he had worried a great deal about the subtle and difficult questions presented by the plaintiffs' complaint, Judge Kaufman, on examining the transcript and the exhibits in the case, found that it was unnecessary for him to decide these issues. It was immaterial in this case exactly what the duty of a school board is to remedy a racial imbalance which has occurred through no fault of its own, for here the judge found that the school board had indeed been at fault.

In short, Judge Kaufman ruled that in 1930 the school board had gerrymandered the Lincoln district so as to withdraw a large portion of its white students, sending them to both the Webster and Mayflower schools; that between 1930 and 1934 the board had altered the boundaries of Lincoln so as to contain in the attendance area the ever-increasing Negro population; and that until 1949 the school board had assured that the Lincoln school would remain Negro by allowing white students to transfer out of the zone. After 1949, when transfers were forbidden, the school board had adhered to the status quo and had left unchanged the situation which it had created by its own wrong. Accordingly, the board had a duty to remedy the situation and to present a plan whereby this would be done.

In his opinion, Judge Kaufman failed to discuss the relationship between the wrong committed in 1930 (and possibly up to 1949) and the racial imbalance in the Lincoln school in 1960. A great many residents of New Rochelle have argued that the 1930 gerrymander could not have had any effect on the present day situation. Lincoln, they have asserted, would have become mostly Negro anyway. In fact, they state, the gerrymander and the transfer provisions had the effect of keeping the area partly white, since most white parents would have moved out earlier if they had had to send their children to Lincoln.[42] On the other hand, Judge Kaufman's implicit conclusion can be defended on a number of grounds. First, it cannot be said with certainty that the Lincoln school would have been so overwhelmingly Negro had the board not committed its wrongs. Although the matter was not explored in the trial, Mr. Daniel W. Boddie, a prominent Negro attorney in New Rochelle and a student in Lincoln from 1927 to 1933, states that the student body in Lincoln went from 25 to 75 percent Negro at the time of the gerrymander. "I didn't understand why at the time, but I did notice that most of my friends disappeared from Lincoln over the summer, and I didn't see them again in school until junior high." By the time Mr. Boddie left the Lincoln school, it was 85 percent Negro and the percentage was increasing rapidly. In 1934 the board itself referred to the Lincoln school as New Rochelle's Negro school. Even if the transfers out of the district had been allowed on a nondiscriminatory basis,[43] the school board by its own actions had created a racial imbalance in the school which could be expected to make white parents send their children to other schools.

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[42] It would seem that the fact that white children in the Lincoln area had to travel some distance to other schools could certainly be expected in the ordinary course of events to make that neighborhood less attractive to them and to aid somewhat in the creation of an all-Negro area.

In view of this, is it any wonder that when the transfers were prohibited in 1949, white parents, rather than send their children to the Negro school, either entered them in parochial or private schools or moved out of the district? Even if it is admitted that the Negro percentage of the Lincoln district would have risen without the help of the school board, it might not have risen so far so fast and might have stabilized into a much better mix than 94 percent Negro. Who can say that if the transition from white to Negro had not been accelerated by the school board, the gradual increase in the percentage of Negroes would not have given the white population a lesson in interracial understanding that would have prevented their flight?

Judge Kaufman might also have held against the board on a purely legal ground. It is a principle of law that a trustee who embezzles stocks or bonds cannot, in his defense to either criminal or civil actions, show that the securities would have become worthless anyway. Nor can a murderer plead that his victim was on the point of death. Here, where the school board clearly contributed to the segregation, it cannot be heard to argue that it would have happened anyway.

There is a middle ground between supporting Judge Kaufman's decision as a question of fact and supporting it as a question of law. The board simply failed to produce any evidence showing that its wrong was not a cause of the 1960 Negro concentration in Lincoln. It was certainly not too much to ask, where the board had committed a wrong aimed at the plaintiffs' race that the board come forward with some evidence that its action had not in fact resulted in any harm to the present plaintiffs. Where, as here, despite its burden of proof, the board failed to produce any evidence on the issue, the question had to be resolved against it.

Thus, Judge Kaufman found it unnecessary to decide whether school boards should consider race or whether they should be colorblind. Here, where the school board[44] had discriminated against members of a race, it had a right and indeed a duty to consider the factor of race if necessary to right the wrong it had previously done. Moreover, good faith efforts in this situation were not enough. The school board had an absolute duty to undo the harm that it had caused. Judge Kaufman did not in his opinion spell out just how this should be done. Rather, he left it to the school board to present a plan for "desegregation," which he might order into effect or modify, to right the wrong he had found.

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[43] Which, as discussed above (p. 48), they were not.

Although not spelled out by the court, the above reasoning seems to support its judgment. Judge Kaufman, however, was not content to rely on one ground. In addition to holding that mere good faith on the part of the present board was not enough to right the previous wrong, he went further, and held that in fact the school board, even since 1949, had not been in good faith in its attempts to solve the Lincoln problem. Judge Kaufman pointed to many actions as indicative of a lack of good faith and as proof that the school board deliberately took no action to remedy the Lincoln situation, not because any action it might have taken would have been educationally unsound or administratively or financially infeasible, but because it desired to continue the segregation of the Lincoln school children.

As proof of bad faith, Judge Kaufman cited a number of facts. First, the school board did not do anything to improve the Lincoln situation. Although this is true, the testimony of Kenneth Low showed, and other testimony suggested, that not only was there "no ideal real solution," but that it appeared to the board that aside from the compromise that it had adopted there was no satisfactory solution. The board did not know what to do and made the decision to rebuild Lincoln almost in desperation.

Judge Kaufman also relied upon the reception accorded Theron Johnson's final report to show bad faith. After pointing out that the report was critical of the board, the judge stated:[45]

> The board's response to this challenge was somewhat less than edifying. The board's president, Mr. Frederic Davidson, wrote immediately to the Commissioner of Education, asking that the report, which the board itself had initially requested, be recalled and repressed.

Thus, the judge's opinion would make it appear that the board was intent only on suppressing criticism. The board, however, had some reason for pique over Mr. Johnson's "refining" his thinking and escaping the "inescapable conclusion" of his previous study. The judge did not mention the charge of the report's having been leaked in advance to the board's opponents or the bad timing of Mr. Johnson's sudden suggestion to postpone the referendum.

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[44] Of course, as a factual matter, the present school board had committed no such wrong. Nonetheless, it is legally responsible for the acts of its predecessors.

[45] 191 F. Supp. at 188, 6 *Race Rel. L. Rep.* at 96.

The next indication of bad faith that the judge found was the board's rejection of the Dodson recommendation, again without referring to the testimony that in fact it was not a satisfactory solution.

The court also found support for its finding of deliberate prejudice by examining the board's 1960 referendum campaign, saying: "The board's activities in an attempt to gain public support for the proposal give strong indication of the absence of good faith in meeting its obligations."[46] The specific acts charged are, first that "it permitted the issue of segregation to be insinuated into the referendum campaign, to the extent that all other factors became obscured."[47] In light of the actual referendum campaign, this is not so clear. From the very inception of the Lincoln controversy the racial imbalance in Lincoln was an issue—an issue brought up much more often by foes of the board than by its supporters. Secondly, Judge Kaufman objected that "The 'status' fears of persons in the districts bordering Lincoln were fostered."[48] By this he meant that school principals made statements such as the following:[49]

> In several schools where a well-integrated situation exists, the proportion of Negro students is steadily increasing each year. Even in those Mayflower neighborhoods where housing integration does exist, the turnover of homes is almost invariably from white to Negro owners. In recent years, the proportion of Negro students at Mayflower has risen approximately two percent each year. Lincoln School rezoning would certainly hasten this process.

Judge Kaufman states of the school board's failure to discipline the principals for this kind of statement that ". . . this is not the conduct of a public body seeking in good faith to reach a legitimate solution to a racial problem."[50] The court makes no allowance for the possibility that the influx of Lincoln children would have upset the relatively stable Mayflower situation, nor for the fact that it is one thing to oppose the admission of Negroes because it would create integration, and a very different thing to oppose it because it would destroy integration already existing. Moreover, board members have since stated that no effort was made to censor principals because they believed that they were entitled to a measure of freedom of speech, especially when they had merely said things a great many other people had already pointed out and which everybody in the community already knew anyway.

As support of his finding that the school board's referendum campaign revealed a positive desire to segregate, Judge Kaufman devoted careful attention to the advertisement.[51] Beginning at the top, he found it improper to brand opponents of the referendum as extremists and propagandists. The judge then suggested that the board had used pressure to induce the PTA officials whose executive boards had supported the rebuilding of Lincoln to allow this fact to be printed; that it had been inaccurate in stating that the Lincoln PTA had endorsed the board's proposal whereas in actuality only the PTA executive board had;[52] and that the school board had threatened taxpayers with "harsh financial consequences" by pointing out that the board could rebuild Lincoln using the more expensive means of 5-year bonds.

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[46] 191 F. Supp. at 190, 6 *Race Rel. L. Rep.* at 98.

[47] *Ibid.*

[48] *Ibid.*

[49] 191 F. Supp. at 191, n. 8, 6 *Race Rel. L. Rep.* at 98, n. 8.

[50] 191 F. Supp. at 191, 6 *Race Rel. L. Rep.* at 99.

Many people in New Rochelle have since stated that, at worst, the ad shows that the board may have been overzealous in pushing its plan rather than that the plan was the result of bad faith. At best, the ad was considerably more fair and reasonable than a great part of the literature usually distributed on both sides of any heated election campaign.

Other evidence in the record which seems inconsistent with a finding of bad faith on the board's part is not mentioned in the opinion. The evidence as to the board's motives in other situations is not irrelevant to its motivation in the Lincoln case. After all, it is not likely that men who actively seek integration in one school will have completely different values and notions of public responsibility when they come to consider another. The testimony that the board had refused to build an admittedly needed second senior high school or third junior high[53] on the ground that this might cause segregation, and the fact that two-thirds of the Negro elementary school children in New Rochelle went to other, integrated schools both suggest that perhaps it was not a desire to foster segregation that motivated the board's decisions as to Lincoln.[54]

The court's finding as to the school board's bad faith receives little support from most citizens in New Rochelle; many opposed to the school board's actions in the Lincoln case do not seem to believe that the school board was acting from improper motives. As Dan Dodson said later, "I believe that if the costs had been less, the school board would have made great sacrifices to achieve integration in the Lincoln school. . . . In this case, though, the costs were just too high for them." Most of the board's opponents in New Rochelle seem to agree. They accuse the board of unwillingness to face up to its responsibilities, of failure to meet the problem head on, of inability to take risks, and of pigheadedness, but not of deliberate bad faith and desire for segregation. The plaintiffs in the case, however, take a different view. They are completely uninterested in the legal niceties which may require a showing of bad faith to upset a school board's ruling. One said, "We don't care what their reason was; they wanted to deny our children a decent integrated education." Another argued, "What do we care about the Board's problems? For three hundred years the Negro has been kicked around in the United States, and we want our rights now."

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[51] App. G.

[52] This statement is inaccurate. The advertisement did not say that the Lincoln PTA had voted in favor of a new school, but that the Lincoln PTA wanted a new school, a fact reasonably inferred from a poll of parents purportedly taken by the PTA executive committee less than a year before.

[53] Nor was this simply nonaction, a refusal to build. The school board did build a junior high school farther north, but at the same time closed what would have been the central—and a racially unbalanced—school.

[54] Similar findings were held to prove the school board's good faith in *Henry v. Godsell*, 165 F. Supp. 87 (E.D. Mich. 1958), 3 *Race Rel. L. Rep.* 914 (1958).

Judge Kaufman's finding of bad faith as an alternative ground for his decision may have had serious consequences. This was the finding that got the publicity, and this was the finding which caused the community to fight to the end to clear its name.

Judge Kaufman's decision shocked New Rochelle. The majority of the board's supporters, until the moment the decision came down, had considered it inconceivable that the judge would decide against them. Almost immediately, the community was split by the next question: Should the decision be appealed? Strangely enough, despite the general feelings on both sides of the Lincoln question that Judge Kaufman had unfairly impugned the integrity of the leadership of New Rochelle, a good number of citizens opposed appealing. These included not only the groups which had fought the board of education before and during the trial, but certain former supporters of the board who felt that the revelations made during the trial had shown the majority to have been wrong. A petition to the board signed by 123 citizens opposed appeal on the grounds that:

1. It would entail unwarranted waste of the taxpayers' money.
2. It would further damage New Rochelle's reputation as a liberal and progressive community.
3. It would continue to divert the Board of Education's time and energies from its primary purpose, namely the educational needs of our children.

The board, however, believing that the decision would in all probability be reversed, voted 6 to 3 to appeal. It argued that this step was necessary, first, to clear the name of New Rochelle, and, second, to do a public service by providing school boards throughout the Nation with a rule of thumb for determining at what percentage a school became too heavily white or Negro.[55]

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[55] Any appellate decision affirming or reversing would have given no real guidance anyway; it would merely have ruled that 94 percent was or was not enough.

Whatever the merits of the first reason,[56] the second clearly does not hold water. Although the plaintiffs' complaint had asked for a decision that the mere existence of a racial concentration in a school greater than a certain percentage placed a constitutional duty on the board of education to take action, the judge had not followed the theory of the plaintiffs' complaint. Rather, he had merely held that, where the State authorities have used their powers to create an overwhelmingly Negro school, they have a duty to remedy this situation.

The next difficulty in the attempt to appeal Judge Kaufman's ruling was that the decision probably was not appealable at this point.[57] Mr. Weiss has since said that he had doubts about the finality of the January 24 decision, and appealed only to protect against the possibility that, on later appeal from a ruling on the board's plan, an appellate court might hold that the board should have appealed earlier. Accordingly, Mr. Weiss was not surprised when the court of appeals raised the question of finality, and then by a 2–1 majority decided that the appeal from Judge Kaufman's decision was premature [58] and that the board would have to wait to appeal Judge Kaufman's final order after a plan had been submitted.

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[56] Specific findings of fact are seldom overturned on appellate review. The courts of appeal do not rule that a district court judge was right or wrong on a finding of fact. Rather, they give the lower court's finding great respect and reverse only if it is "clearly erroneous."

[57] In general, a district court decision must be "final" before it may be appealed. A final, and hence appealable, judgment is one which terminates the litigation on the merits, leaving at most only simple, mechanical questions to be decided. In this case a great deal more than simple, mechanical questions needed to be resolved: Judge Kaufman had yet to decide what to do to disestablish the pattern of segregation he had found in the Lincoln school. The purposes of the final judgment rule are twofold. First, the rule is designed to force the losing party to determine whether he has actually been legally hurt by the judge's ruling before he decides whether to appeal. (Mere injury to prestige is not enough.) Here, it was at least theoretically possible that when the school board's plan was submitted, Judge Kaufman would render such a Solomon-like decision that the board would have no objection to complying and hence might not wish to appeal. The second reason for the final judgment rule is to discourage piecemeal appeals. It is true that the requirement of finality would put the board to the trouble, possibly unnecessary, of formulating a plan for Judge Kaufman. On the other hand, this trouble would certainly be no more than commensurate with the difficulties the appellate court would have deciding the appeals piecemeal: first, when Judge Kaufman's present decision was appealed, and later, if that were affirmed, when the judge had decided on the remedy for the wrong he had previously found.

[58] 288 F. 2d 600 (2d Cir. 1961), 6 *Race Rel. L. Rep.* 418 (1961).

The Plan

After the court of appeals' decision was handed down, a committee of the board began work on the plan in earnest[59] and in due course, presented it to the full board which, over the vigorous dissent of a minority of three, approved it for submission to the court. The plan provided that:[60]

> Any pupil attending the Lincoln Elementary School, without regard to race, creed, color or national origin, shall be permitted to register and enroll in any elementary school in the New Rochelle Public School System, under the following conditions:
>
> (1) There shall be available a seat to accommodate the child in the grade to which he seeks admission.
>
> (2) Admission of out-of-district pupils shall be made only in conformity with the Board of Education's class size policy.
>
> (3) Any pupil for whom such transfer is sought shall be recommended by his classroom teacher and principal as being able to perform in academically satisfactory fashion on the grade level to which he is assigned, with the recommendation and request being subject to the approval of the Superintendent of Schools.
>
> (4) Permission granted for such transfer shall be on a year to year basis, with children actually living within the confines of the receiving school district having priority in admission to a given school and seats within the classrooms.
>
> (5) Any parent requesting such a transfer shall give a written statement expressing his willingness to provide transportation at his own expense.
>
> (6) The Board of Education reserves the right of flexibility in the administration of the transfer plan in keeping with the overall administration of the school system, since the Board cannot lawfully surrender its powers and duties conferred by the State Education Law.
>
> (7) All requests for such transfers shall be received annually in the office of the Superintendent of Schools not later than 1 June, preceding the opening of school in September each year except in 1961, the final date being 15 June, 1961.

Before the plan was submitted to the court, a preamble was added which, in essence, argued the board's position on the general question of the neighborhood school policy as applied to an overwhelmingly Negro area. It pointed out that Washington, D.C., had 11 all-Negro schools, and blamed the existence of the Lincoln problem on housing patterns. This preamble failed to recognize that the court had already held that the school board, not merely the residential pattern, was responsible for the situation.

The plan imposed upon transferring Lincoln pupils several conditions which were not clearly defined. It would seem that the conditions would be approved by a judge only if he had complete confidence in the school board and its officials. The findings with regard to good faith showed this confidence to be lacking.

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[59] Julius Weiss advocated a plan which merely redrew the boundary lines around Lincoln, on the theory that this would restrict Judge Kaufman to solutions involving such changes in zone lines. The board, however, discarded this type of plan as not sufficiently respectful of the court.

[60] 195 F. Supp. at 234, 6 *Race Rel. L. Rep.* at 702.

School officials have since argued that each of the conditions attached to the transfer proposal was added to meet a legitimate need. The first two conditions were designed to prevent further overcrowding in some of the schools. Although plenty of seats were available for transferees in some schools without increasing class size beyond the 29-pupil maximum which the board felt was essential for proper education, available seats were not evenly distributed. Accordingly, the board's plan attached the condition that room for the transferring students be available in the receiving school.

School officials assert that the third condition, requiring three levels of approval before transfer, was included for educational reasons. Although the plaintiffs had argued vigorously that the Lincoln school was inferior to the other elementary schools in curriculum and in teaching, which the school board had denied,[61] there is no doubt that the scholastic performance of many Lincoln students was not up to that found in certain other schools in the city. Thus, although there were many children in Lincoln who were capable of competing with students at, for instance, Roosevelt or Ward, there were also many students in Lincoln whose scholastic record was so far below the general level in north-end schools that their transfer there would, the school authorities felt, be a disaster. The board and the superintendent felt that indiscriminate transfer of Lincoln children into any north-end school, would completely disrupt education in the receiving school. The officials feared that, in addition, the transferees would be unable to compete or even to keep up, and would probably suffer diminished motivation because of this. Lastly, they felt that mixing the least advanced of the Lincoln children with those of a vastly higher educational, financial, and cultural background might actually confirm unhealthy racial stereotypes in the minds of the pupils in the receiving schools, rather than destroy them.

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[61] Actually, the school officials during and before the trial had been most careful to say that the curriculum in the Lincoln school was not inferior to that of any other school, *considering the abilities of the Lincoln children*. Many people found this qualification hard to grasp. Again and again Judge Kaufman asked the board members at the hearing on the desegregation plan whether there wasn't an inconsistency between setting up the requirement of approval for transfer and their previous position that the teaching and curriculum in the Lincoln School was as good as any in the city. Even the Department of Justice in its *amicus* brief on appeal stated, "Incidentally, in view of appellants' statements, in their applications for a stay, that Lincoln provides educational facilities on a par with all other New Rochelle schools, it is difficult to understand the necessity of such a provision." Actually, the board had been most careful not to assert that the student body at Lincoln was as well educated as any in the city, since this was clearly refuted by the plaintiffs' exhibits. See app. B, C, and D.

In this area, the board's exact purposes might have proven acceptable had they been stated precisely. The condition for approval that the transferee be "performing in an academically satisfactory fashion" was too vague. For example, it would have been difficult to complain that the board had placed an unreasonable condition on transfer if it had stipulated specific standards, such as a requirement that before a child could transfer, his reading or arithmetic level had to be within 3 years of the average level of his grade in the school into which he wished to transfer. In this case the board would probably still have been attacked[62] for casting aspersions on the Lincoln children. It could have replied, however, that many Lincoln children might transfer to any school in the city; that no child would be denied transfer to a racially balanced school where the transferee fitted into the ability range of the class he would enter; and that the absence of this condition would throw an intolerable strain on the education of all pupils in the school.

Again, the fourth condition, limiting transfer to a year at a time and granting preference to children living in the zone, was attached to prevent any unexpected increase in the population of a particular school from swelling class size beyond the board's maximum. The board assumed, perhaps incorrectly, that it had the right to assure that zone residents would receive preference over transferees, and thought that this was not unfair for two reasons. The board believed, first, that a parent who had paid a large sum for his house because of its location in a "good" school area should have the right to have his children go to that school; and second, that so long as the transferees might go to another integrated school they had no complaint. Regardless of its objectives in this respect, the plan, by threatening a possible retransfer at the beginning of each school year, shows a complete insensitivity to the emotional needs of the Lincoln children. Moreover, it is such an obvious deterrent to transfer that it had almost no chance of being sustained by Judge Kaufman.

The fifth condition in the board's plan, regarding transportation, was designed to make certain that each parent understood that his children would not be transported at public expense. The board had heard of rumors in the Lincoln area that children would receive free transportation (and possibly, later, free lunch) if they transferred to other schools. The board wished to prevent unfounded hopes. The sixth condition was merely a general statement of the fact that to provide for unforeseen contingencies administration of the plan had to be flexible.

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[62] The minority members of the board attacked the board's plan as "replete with nasty implications" such as that "Negroes are generally below grade level, that the Lincoln school pupils are scholastically below respective classes in other schools and that there is a higher percentage of emotionally disturbed children at Lincoln."

The board explained the impreciseness of its plan in an accompanying memorandum which stated that: "The board places the utmost confidence in the integrity of its teachers, principals, and the superintendent of schools, and is satisfied that the plan will be fairly administered."

One may ask why the board's plan was submitted in such form, thus forfeiting any real chance of court approval. One answer often given in New Rochelle is that the board expected the case to be reversed on appeal, so that there was little reason for expending effort on the plan. Another is that the abortive appeal had prevented the start of work on the plan until there was very little time left. But probably the most important reason advanced was the feeling by the board that there was no use trying to satisfy the court.

Whatever the board's reason, the consequences of submitting such a plan were inevitable. It was probably too late for a compromise that might have been acceptable during the trial—the immediate dispersal, perhaps on a first-come-first-served basis, of 100 pupils to other schools. However, the k–3 plan, which from the board's point of view was probably the next best choice, was not foreclosed. Despite his finding against the board on the issue of their good faith, Judge Kaufman had extended the olive branch to them in his opinion, stating: "Men of good will, such as the individual members of the board submit they are, could have solved and still can solve the problem by exercising the judgment and understanding for which they presumably were chosen." [63] By refusing this overture, the board gave up its last chance for compromise.

At this stage in the litigation, Mr. Zuber was formally joined by Constance B. Motley and Thurgood Marshall, attorneys from the NAACP Legal Defense and Education Fund which had given him aid during the previous proceedings. In a brief filed by these three attorneys, the plaintiffs opposed the board's plan. They, however, were no more helpful to the court than the school board had been. Although they attacked the plan on a wide number of grounds, referring to it as void on its face, nowhere did they submit what they wished as an alternative. Worse than that, they objected to the wrong things. They objected to the fact that, "The plan expressly provides for the continuation of the Lincoln school." [64] As long as completely free transfers to other schools are allowed no court has yet intimated that there is any constitutional objection to allowing parents the option of sending their children to the most convenient school, even if it is overwhelmingly Negro.

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[63] 191 F. Supp. at 197, 6 *Race Rel. L. Rep.* at 104.

[64] *Taylor* v. *Board of Education of New Rochelle, N.Y.*, Civ. No. 60–4098. Brief of Plaintiffs, filed May 9, 1961.

Secondly, the plaintiffs complained that: "The plan which has been submitted by the majority makes no provision for disestablishing the lines [which the court found had been drawn to coincide with the population movements] and for their . . . realignment."[65] This misses the point. The court did not find that the present boundaries of Lincoln had been drawn to confine Negroes there, and in fact, as everyone knew, no boundaries, however drawn around Lincoln, could have brought any substantial numbers of white pupils into the school. It is difficult to see why the plaintiffs' attorneys, knowing that no change in the boundary lines would have improved the situation, nonetheless demanded that one be made.

Next, the plaintiffs' brief turned to an examination of the conditions placed by the school board on transfer. It objected that the right of transfer was improperly made contingent upon a lack of overcrowding and upon an ability test not applicable to other transferees. The first of these objections is somewhat overstated. It is not completely accurate to say, as the plaintiffs did, that, "If a seat is not available . . . the child may not transfer. In short, overcrowding will be used as a justification for continuing to segregate an applicant."[66] Since there were plenty of schools which were integrated and not overcrowded, this objection does not seem to be well taken.

The plaintiffs' charge that the transfer policy "provides for the application of a criterion to the Lincoln transferees not applicable alike to other transferees in the school system similarly situated,"[67] seems even more overstated. It is true that the criteria applying to the Lincoln transferees were in no way spelled out, but to say that the plan envisaged different standards to be applied for Lincoln students than for other transferees is misleading. In fact, there were almost no students in other schools who would be permitted to transfer under the rigid rules which the board had previously laid down for the whole school system. Some of the criteria for transfer might be unfair, burdensome, or otherwise improper, and any such conditions might certainly be attacked for this reason. However, to protest the imposition of any criteria on the ground that they applied only to the Lincoln students is misleading in view of the fact that only Lincoln students would have the right to transfer.

A similar fallacy underlies the plaintiffs' last objection, that under the board's plan the parents of the Lincoln children would have the burden of paying for their own transportation. The plaintiffs' opposition to the board's plan states:[68] "Here again a hardship imposed on

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[65] *Id.* at 4.
[66] *Id.* at 5.
[67] *Id.* at 6.
[68] *Id.* at 7–8.

Lincoln transferees which is not shared by other transferees or by other children who live a great distance from the north-end schools and whose transportation expense is borne by the board." This statement that transportation of other students was provided at public expense is simply not true. No students other than the handicapped were given this privilege.[69] Although it is true that simple economics would be some constraint on completely free transfer to distant schools, no court has held that transportation at public expense must be provided for pupils electing to attend distant schools. In this case because of State law previously mentioned such a requirement would have placed an enormous burden on the school board's finances.

The confusion over the board's plan was further compounded by the submission of a "minority plan" by the three members of the board who had voted against the board's plan. This proposal provided for the compulsory transfer of the fourth through sixth grades out of Lincoln to five other schools,[70] the permissive transfer, subject only to the board's class-size policy, of the kindergarten-through-third-grade children, and the complete abolition of the Lincoln school in 1964.

On May 10, 1961, Judge Kaufman held a hearing to determine what plan should be adopted to undo the constitutional violation previously found. In contrast to the previous proceeding in the Federal court, this hearing was conducted in an atmosphere of acrimony and bitterness. Mr. Weiss charged that Mr. Zuber had deliberately harassed the board by unnecessarily subpenaing various witnesses to the court to testify concerning the plan, and that he had further violated the canons of legal ethics by attacking the school board in the public press.[71] Judge Kaufman, on the other hand, accused both sides of "trying the case in the newspapers," attacked the board's supporters in New Rochelle for deliberately distorting his opinion, and then advised the board:

> . . . that it would be in the definite interests of the people in New Rochelle if the board, instead of taking its time up with perfecting an appeal and hiring lawyers and expending more of the taxpayers' money, devoted their time to carrying out the will of the court. . . .

The hearing on the plan was productive of neither information nor agreement. Only five witnesses were called—all by Mr. Zuber. These were Merryle S. Rukeyser, the president of the board, and Charles G. Romaniello, chairman of the committee in charge of drawing up the plan (both members of the board majority); Nolan Fallahay and Seth M. Glickenhaus (members of the minority); and Dr. Herbert C. Clish, Superintendent of Schools. Their testimony revealed only that relations between the plaintiffs and the defendants, between the majority and the minority of the board, and between the board and the court had so deteriorated that it was impossible to expect any cooperation or even communication.

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[69] Perhaps plaintiffs' attorneys assumed that the private bus hired by parents in the Ward area to take their children to school was paid for at public expense.

[70] Webster, Mayflower, Columbus, Jefferson, and Roosevelt. The Washington school was not included because it was already 52 percent Negro, and the five remaining schools, because they were too far from Lincoln.

[71] Mr. Zuber had been quoted as stating that "any lawyer who has the temerity to place this plan before a court should be disbarred."

Most revealing in this respect is Mr. Fallahay's testimony that since the court's original opinion of January 24th, there had been "a complete freezing of knowledge" from the minority board members. Until that time "every instance in every case that the Lincoln School was discussed . . . even though I may have been a minority, I always received the information in advance and I was always treated in a gentlemanly fashion." This, he testified was no longer true.

Two days after this hearing, Judge Kaufman filed a request with the Attorney General of the United States asking that the Department of Justice intervene in the case as a friend of the court to help formulate a plan. Although this procedure is unusual, there had been three precedents for the judge's action—two in Louisiana, and one, Little Rock, in Arkansas. These cases, however, had not dealt with the formulation of any plans but rather with the enforcement of orders already entered.

About 2 weeks later, the Department of Justice submitted a 16-page brief which, although declining to recommend any precise desegregation plan, stated that experience in several border cities, including Washington and Baltimore, indicated that some sort of free transfer arrangement would be preferable. The brief attacked the board's plan as "defective in a number of respects," and singled out the condition requiring transferees to obtain three levels of approval, stating that:[73]

> Any one of the three persons whose concurrence must be sought may determine, by means and upon criteria not made clear in the plan, that a child is academically unsuited for transfer and thus block the request for transfer to another school.

On May 31st, 2 weeks after receiving the Department of Justice brief, Judge Kaufman handed down his final order on the desegregation of Lincoln school. In essence the judge adopted the free transfer idea suggested by the board and by the Department of Justice, without most of the board's conditions. Thus, Judge Kaufman decreed a completely free transfer for all Lincoln students, subject only to there being enough room in the receiving schools. The mechanics of the judge's plan involved the board's distributing to all prospective Lincoln students at the end of every school year a list of the other elementary schools in the city of New Rochelle, specifying the approximate number of vacancies by grade in each. From this list the student could select at least four schools, in preferential order, and had to be granted a transfer to one of them if space was available. The court's plan also provided that: "The board is not to impose any standard of academic achievement or emotional adjustment as a requirement for transfers,"[73] and that, "Each pupil shall be retained in the school to which he has transferred until the completion of his elementary education, unless he becomes a resident of another school district . . . ,"[74] thus canceling two conditions in the board's plan to which the greatest objection had been taken. The judge, it should be noted, agreed with the board on two major points. He did not enjoin the continued operation of the Lincoln school,[75] and he did not require the board to furnish transportation or pay transportation expenses for the Lincoln transferees. Judge Kaufman provided in his order that he would retain jurisdiction over the case to assure compliance with his decree and to attend to any unforeseen contingencies.

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[73] *Taylor* v. *Board of Education of the City School District of New Rochelle, N.Y.*, Civ No. 60–4098. Brief of the United States as *amicus curiae*, filed May 24, 1961, p. 5.

As soon as Judge Kaufman handed down this decision, the school board moved on two fronts. At the same time as it moved to comply with his order by collecting statistics on the number of vacancies that would be available in the fall in the 11 elementary schools other than Lincoln, it also began work on a request to the court of appeals to stay Judge Kaufman's order pending appellate review of his decision.

On June 14th, the statistics on projected enrollment in the "receiving schools" were sent out to the Lincoln parents, and immediately a great outcry was raised by the opponents of the board. During the trial Dr. Clish had testified that there were then 940 vacancies in other schools and Judge Kaufman had assumed that this would be so the next fall. The board's count was only 385, less than enough to accommodate all Lincoln pupils. Two schools, Davis and Jefferson, had no vacancies at all and six others had none in at least two grades.

The next day Mr. Zuber announced that he had advised the Lincoln school parents to disregard the school board's seat availability statistics, and to demand transfer on the basis of the 940-seat figure which had previously been given in court. Mr. Zuber announced that he was returning to Judge Kaufman so that the "court can take steps" if the school board had "openly and flagrantly defied the order."

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[73] 195 F. Supp. at 241, 6 *Race Rel. L. Rep.* at 708.

[74] *Ibid.*

[75] Nor did Judge Kaufman enjoin the construction of the new Lincoln school. Actually the plaintiffs had not asked for this injunction in their complaint. They had requested the injunction only if the board was permitted to follow its neighborhood school policy with respect to the Lincoln school.

Five days later Mr. Zuber filed a complaint with Judge Kaufman attacking the legal basis of the board's statistics and the use of projected enrollments instead of actual classroom figures. During the hearing on the complaint Judge Kaufman stated to Mr. Weiss: "I will not stand for six people constituting a super-Supreme Court for judging findings . . . I have had difficulty getting across to them that they must accept the ruling of the court." The judge asked, "Did it ever occur to you [the school authorities] . . . that an explanation was due the court when more than 500 seats disappeared?" He then ordered the board to submit an affidavit showing the calculations and figures underlying its estimate of vacancies. In response to this order, the board submitted a 48-page study of enrollment trends which had been completed after the trial and an 8-page affidavit by the superintendent of schools, Dr. Clish, explaining how this study applied to the specific figures he had sent out. Several weeks later, though no opinion was filed, the school board's position on the number of vacancies was upheld by the court.

The Appeal

Meanwhile, the school board had been proceeding with its appeal. First it attempted unsuccessfully to obtain an order from the Court of Appeals for the Second Circuit staying Judge Kaufman's order pending the final disposition of the appeal. Then, in mid-June, over the objections of Judge Charles E. Clark, who wished to hear the case that week, the appellate argument was set for the week of July 17. At this point the school board minority filed a motion with the court of appeals to have the appeal dismissed on the ground that the resolution of the school board authorizing appeal applied only to the first, premature appeal and that the present appeal was therefore taken without authority.[76]

On July 19, 1961, the case was argued before a panel of three judges of the Court of Appeals for the Second Circuit.[77] Julius Weiss argued the case for the board, and Mrs. Constance B. Motley, an appellate specialist who had previously joined Mr. Zuber, handled the appeal for the plaintiffs. Mr. Weiss in his argument asked for reversal on a number of grounds—that the court below had not defined gerrymandering; that no evidence had been offered by the plaintiffs showing the actual number of white and Negro residents in the Lincoln area; and that a conclusion of gerrymandering could not rest solely on the grounds that the Lincoln school was 94-percent Negro in 1960. When asked specifically about the 1930 boundary changes, Mr. Weiss characterized Mrs. White's testimony as "pure gossip" and stated that the board of education maps and exhibits showing all the changes which had been made in the school zones gave perfectly legitimate reasons for each redistricting.

On August 2, 1961, 15 days after the case was argued, the appellate court handed down its opinion affirming the district court by a 2-to-1 vote.[78] Judges Charles E. Clark and J. Joseph Smith formed the majority for affirmance; Judge Leonard P. Moore voted to reverse the lower court. The majority opinion, written by Judge Clark, was short. Although it did not discuss the evidence, it stated that the testimony supported the finding that the "defendant school board had deliberately created and maintained Lincoln School as a racially segregated school,"[79] and that the[80]

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[76] The court, however, ruled against the intervening board minority and held that the appeal was properly before it.

[77] Briefs were filed not only for the parties in the case, but for Seth M. Glickenhaus, Nolan M. Fallahay, and Marylyn W. Pierce, applicants for intervention; for the United States as *amicus curiae*, for affirmance; for the American Jewish Committee, American Jewish Congress, Anti-Defamation League of B'nai B'rith, Catholic Interracial Council of New Rochelle, and the Urban League of Westchester County, *amici curiae*, for affirmance; and for the New York State School Boards Association as *amicus curiae*, for reversal.

[78] 294 F. 2d 86 (2d Cir. 1961), 6 *Race Rel. L. Rep.* 708 (1961).

> . . . acceleration of segregation up to 1949 and its action since then amounting only to a perpetuation and freezing in of this condition negate the argument that the present situation in Lincoln School is only the chance or inevitable result of applying a neighborhood school policy to a community where residential patterns show a racial imbalance.

Rather, the majority concluded, the record showed that "race was made the basis for school districting, with the purpose and effect of producing a substantially segregated school."[81] The court went on to find that the "94 percent Negro enrollment at the Lincoln School . . . approximates closely the harmful conditions condemned in the *Brown* case"[82] and that "since these conditions were the result of the deliberate conduct of the board the plaintiffs and those similarly situated are entitled to some form of relief."[83] As for the relief, the majority stated: "The plan which the court eventually adopted is one noteworthy for its moderation . . . we think this plan an eminently fair means of grappling with the situation."[84]

The majority opinion did not discuss the relationship of the gerrymander in 1930 and the transfer policy up to 1949 to the situation in 1960. Nor did it consider the factual foundation for the finding of segregationist motive on the part of the present board, except to lay great stress on its failure to follow the Dodson recommendation.[84]

The dissent by Judge Moore considered the issues in more detail. As a prelude, he said:[85]

> . . . Closely connected with our heritage are such concepts as individual freedom, democratic elective processes, States' rights and equal protection of our laws for all. Too easy is it to march behind a banner bearing such slogans. History records that the populace, singing and cheering, once marched behind a certain gigantic horse of wood. It seemed harmless enough at the time. History has a way of repeating itself. Would that my Cassandra-like pessimism might prove to be ill-founded.

As to the discrepancy between the allegations in the plaintiffs' complaint and the theory of the lower court's decisions, he observed:[86]

> Despite a modern tendency to regard pleadings as old-fashioned—and hence of little value—only by such allegations can the issues be ascertained and defendants advised of the charges against them (parenthetically, also a constitutional right).

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[79] 294 F. 2d at 38, 6 *Race Rel. L. Rep.* at 709.

[80] 294 F. 2d at 39, 6 *Race Rel. L. Rep.* at 710.

[81] *Ibid.*

[82] *Ibid.*

[83] *Ibid.*

[84] *Ibid.*

[85] 294 F. 2d at 40, 6 *Race Rel. L. Rep.* at 711.

[86] 294 F. 2d at 41, 6 *Race Rel. L. Rep.* at 711.

As noted previously, the board had not taken advantage of the various pretrial methods open to it to find out exactly what was or might be an issue in the case. Furthermore, since the board had consented to have the hearing on the injunction considered to be the trial on the merits after all plaintiffs' evidence had been presented, it was not in the dark as to the possible issues in the case.

Judge Moore next attacked the testimony as to gerrymandering:[87]

> The proof as to both purpose and effect is fatally defective. No facts were produced to show the racial composition of Lincoln district either before or after the supposed "gerrymandering." In fact, the only testimony relevant to the issue of "gerrymandering" was that of a Mrs. Bertha White, who stated that the redistricting corresponded to Negro population changes. Mrs. White had no first hand knowledge of the situation in 1930; nor did she supply facts and figures as to the racial balance existing at the periods when the lines were changed. Her conclusions were based exclusively on conversations "with children who went to school in 1929 and 1930, who had younger brothers and sisters who went to the school."

In condemning this testimony as hearsay, however, Judge Moore did not point out that it had come into the record without either an objection or a motion to strike by the defendents, and, therefore, was properly considered by the trial judge. Nor would the absence of specific facts and figures as to the Negro population of the area appear to be fatal, since there was evidence that the percentage of Negroes in the Lincoln school increased considerably with the 1930 gerrymander and that this was the result intended by the board.

Next the dissent hit at a more vulnerable point. Judge Moore argued that, regardless of any wrong committed by the school board in 1930—[88]

> . . . the evidence demonstrates to an almost mathematical certainty that the present "racial imbalance" in the Lincoln School could not have resulted from this alleged "gerrymandering." Had the boundary lines between Lincoln and Webster not been so drawn in 1930 "that, in one section, they were extended to a point directly across the street from the Lincoln School," but instead had been drawn so that the Lincoln School was in the center of its district, the racial balance would have been no different today because the present district lines are now drawn as plaintiffs presumably claim they should have been drawn in 1930. . . . The conclusion is thus inescapable that the population movement over the years has completely vitiated the effects of any supposed gerrymandering in the 1930's.

It seems to be an overstatement to say that the evidence demonstrates anything about the causes of the Lincoln imbalance "to an almost mathematical certainty." Rather, as previously pointed out, the record contained little evidence on the issue. The question would seem to be whether Judge Kaufman would have been unreasonable in assuming that once the plaintiffs had shown an earlier unconstitutional wrong aimed at their race, it then became the duty of the defendants to show that in fact their wrong had not been harmful to those of the plaintiff's generation.

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[87] 294 F. 2d at 45, 6 *Race Rel. L. Rep.* at 715.

[88] *Ibid.*

As to the second ground for the lower court's decision—the board's desire after 1949 to maintain Lincoln as a segregated school—Judge Moore assumed that Judge Kaufman had been factually correct and argued that, even so, no constitutional question was involved:[89]

> The trial court has held in effect that when racial imbalance not attributable to unconstitutional State action is present in a public school, the State or its agencies, although not being required to change the situation, cannot refuse to act if the refusal is motivated by purposeful desire to maintain the condition. In short, the court has extended the Constitution to the point where motives for State non-action are now relevant. But does not the mere statement of this rule, stripped of its semantic gloss, carry its own refutation?

This argument, which distinguishes between action in deciding to rebuild Lincoln and inaction in continuing it as a neighborhood school, is a broad one. In some situations a failure to take action to correct an inequity which has developed without the fault of the State might, if done with a discriminatory purpose, violate the equal-protection clause of the Constitution. Nonetheless, each year the board tells students that they must register at a particular school, and the mere fact that it gives the same instruction year after year cannot be said to be nonaction. An analogy may be drawn to State legislative districts which have, because of population changes, become grossly unrepresentative. The State in such a case has been held to have a positive duty to revise its districts.[90]

Lastly, Judge Moore took up the question of the court's remedy for the constitutional violation it found. After a sly dig at Judge Kaufman for his obvious irritation with the board for "continuing their attitude of arrogance" by their assertion of their constitutional right to claim that "no constitutional rights have been violated," Judge Moore took Judge Kaufman to task for reinstating the same plan that was abandoned by the board in 1949 which he had held was partially responsible for the imbalance in Lincoln. There is one major difference, however, between Judge Kaufman's order and the transfer provision withdrawn in 1949. It is very clear that the present plan will be administered in a way which does not discourage or prevent Negroes from transferring.

Finally, Judge Moore argued that the district court order was invalid because it discriminated in favor of the residents of a heavily Negro area and against Jewish or Italian children who might wish to transfer out of their ethnically unbalanced schools. Judge Moore questioned, "How can a permissive transfer policy be granted only to 1 out of 12 districts . . . why should not the Jewish or Italian child be given equal privileges to transfer?"[91] This question has several answers. First, only the Lincoln zone was at issue in the suit. If the Italian or Jewish children wish to complain of segregation, they can bring suit themselves, and obtain appropriate relief. Until that time, there is nothing wrong with aiding the children who have a right to aid and want it. Second, under the findings of the court, only the Lincoln children were wronged by the board's gerrymander which helped to turn their school into a "Negro" school. Therefore, only the children forced to attend this school should have a right to transfer out. Lastly, there was expert testimony to the effect that, because of the history of Negroes as a race, their high visibility, and their position in a white culture, an all-Negro or overwhelmingly Negro school was different from one attended by most other minorities.[92]

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[89] 294 F. 2d at 47, 6 *Race Rel. L. Rep.* at 716.
[90] *Baker* v. *Carr*, 369 U.S. 186 (1962).

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The day after the court of appeals handed down its decision, the board moved to carry its fight further. President Merryle S. Rukeyser stated, "There are novel constitutional questions involved" which "should be passed on by the Nation's highest court." Mr. Rukeyser stated further that "the 'box score' on the Lincoln case now stands 3 to 3." State Commissioner of Education James E. Allen, Jr., New Rochelle Acting City Judge Robert J. Burton,[93] and Court of Appeals Judge Leonard P. Moore had found no segregation in New Rochelle, while District Judge Irving R. Kaufman and Court of Appeals Judges J. Joseph Smith and Charles E. Clark had found the Lincoln school segregated.[94]

Mr. Rukeyser called a meeting of the school board for the next day to vote on whether to apply for review in the U.S. Supreme Court. At this meeting the board, with three members absent, voted 5 to 1 in favor of seeking review in the Supreme Court. The negative vote was cast by Mrs. Pauline Flippin, who had replaced Mrs. Pierce as the only Negro on the school board. In pursuance of the school board's plan to seek further review, counsel for the board again moved in the court of appeals for a stay of Judge Kaufman's order putting the transfer plan into effect. This motion was denied the same day by the court of appeals, and the board lawyers then moved for a stay from the Supreme Court. Shortly thereafter, their request was denied by Justice William Brennan in a brief opinion[95] which stressed the fact that it was not at all clear that the Supreme Court would grant review in this case, where both the district court and the majority of the court of appeals had agreed on the facts.

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[91] 294 F. 2d at 50, 6 *Race Rel. L. Rep.* at 718.

[92] This last ground was not directly at issue in the *New Rochelle* case, and it is not necessary to consider it here. When it does arise there will presumably have been a great deal more study of the issue to aid in its determination.

[93] Judge Burton, in ruling against New Rochelle in the prosecution of the plaintiffs' parents on the charge of loitering near a school, had in an *obiter dictum* opined that the Lincoln school was not "segregated."

[94] This is very much like a baseball player's claiming that his team had won more than half the innings, as if it were not really too important that their final score was less than that of their opponents'.

[95] 82 Sup. Ct. 10 (1961).

Meanwhile, the Lincoln parents and the New Rochelle authorities were moving to implement Judge Kaufman's order. After a series of mass meetings in which they were urged to enjoy the fruits of the victory that had been won and to do the right thing for their children, parents of 267 Lincoln children submitted transfer applications to the superintendent of schools. These applications were immediately time stamped and dated and were placed in order by the date and hour they were received at the superintendent's office. After the deadline for transfer applications, the first choices were assigned in order of their submission; then the second, third, and fourth choices were similarly filled. Those transferees who either had not listed four schools as choices, or had found all their choices preempted by students who had applied earlier, were telephoned at their homes by the superintendent of schools and given a list of schools where seats were still available.

The superintendent of schools also wrote the head of each religious organization in New Rochelle asking that cooperation with the school board be urged to provide for the proper acceptance and adjustment of the transferring pupils; he also held meetings with each of the elementary school principals and with the custodial staffs to assure a smooth reception to the transferees.

This and other careful, quiet work paid off when on September 7, the opening day of school, the Lincoln transferees, ranging from kindergarten through sixth grade, appeared and were absorbed uneventfully into the city's 11 other elementary schools. The Roosevelt school, which had had no American Negroes,[96] received 80 Lincoln transferees. The Mayflower school, which was already 30-percent Negro, received 63. Even the Washington school, which had been 52-percent Negro, received 14 Lincoln transferees, despite the NAACP's urging that no Lincoln students transfer there. Some minor difficulties developed. One of the 12 original plaintiffs charged that she had not received transfer assignment for either of her 2 children,[97] and the local NAACP president accused the school board of deliberately having split up families by sending one child to one school and a brother or sister to another,[98] and of overpublicizing the request of eight pupils to transfer back to Lincoln. In all of these cases, however, the disputes were settled amicably.

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[96] The children of the Liberian and the Ghanaian delegates to the U.N., however, had attended the Roosevelt school.

[97] School authorities claimed that either she failed to file a transfer application or it was lost in the mails.

[98] Although the school board was able to refute this by showing the completely mechanical method of assignment, the Negro leadership of New Rochelle is unconvinced. They assert first that the number of split families was too great for it to have been pure coincidence—one family had 8 children assigned to 5 schools; secondly, that the board should have worked out a plan to avoid splitting families.

After the court's order had been carried out uneventfully, the further legal battles came as an anticlimax. On October 26, 1961, the school board filed its petition for certiorari in the United States Supreme Court. This petition raised two questions: "Is this truly a segregation case . . . ?" and "Has the petitioner [the school board] been accorded due process?" In arguing their first question the attorneys for the school board again appeared to have misconceived the scope of Judge Kaufman's ruling, stating,[99] "The decree denies the application of the neighborhood school policy to one district for no reason other than that it is heavily populated by Negroes."

The petition then discussed at some length the legal questions involved in an attack upon the neighborhood school policy and the racial imbalance that it may cause. The word "gerrymander" was not mentioned. As to the second ground, the school board claimed it had been denied "due process," because it ". . . was never apprised of, nor given the opportunity to meet the charge that a racially segregated school was created years ago."[100]

The brief in opposition to the granting of Supreme Court review discussed the lower court's factual findings in detail and relied primarily on the principle that: "This Court has consistently ruled that a petition for writ of certiorari will not be granted merely to review the evidence or inferences drawn therefrom, or to permit this Court to review facts found by two lower Federal courts."[101] The brief did not even reply to the board's second point. It is well settled, however, that a variance in a civil case between the pleading and the proof does not, in general, raise a constitutional question. Moreover, here the board had not only heard all of the plaintiffs' evidence before consenting to having the hearing on the injunction considered to be the trial on the merits, but made no motion to reopen the case for the addition of further evidence, after Judge Kaufman's ruling.

On Monday, December 11, the Supreme Court handed down a brief order denying certiorari in the case.[102] Some board supporters in New Rochelle have argued that denial was a recognition by the Court that if it had granted certiorari to the school board and reviewed the case, it would have had to overturn the lower courts' rulings. The great majority of the community, however, merely looked upon the event as the last step in a bitter and unpleasant legal battle.

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[99] School Board of the City of New Rochelle, Petition for a Writ of Certiorari No. 518, filed Oct. 26, 1961.

[100] *Id.* at 8.

[101] Brief in Opposition to Petition for Writ of Certiorari, filed Nov. 17, 1961, p. 9.

[102] 368 U.S. 940 (1961).

Conclusion

It has been a full school year since the desegregation plan was put into effect, and it is appropriate to ask,[103] How did it work? First of all, many of the problems which had been predicted did not materialize. There was no administrative chaos. Lincoln did not become more racially imbalanced; rather, since most of the white children chose not to transfer, the percentage of Negroes in Lincoln dropped from 94 to 88. Moreover, although New Rochelle is extremely school conscious—over half of the ads to sell houses specify school district—the presence of Lincoln children in the other schools does not appear to have had any effect on nearby real estate values. Nor were transferring Lincoln students greeted with hostility or treated as those who had unfairly won a special privilege; on the contrary they were received warmly, and every effort was made by both teachers and students to bring them into the life of their new schools.

It is too early to estimate the full effects of the free-transfer provision on more subtle issues, such as the educational development of New Rochelle's children, both Negro and white. Nonetheless, a number of observations can be made. Some Lincoln children transferring to schools nearby were stimulated by their new environment. There were those who had always been reluctant to go to the Lincoln school, but who, once admitted to Webster or Mayflower, changed their attitude toward school completely. They experienced an increase in motivation and interest which was reflected in their school work. Other students showed improvement in attitude and discipline, but showed no gain in academic performance. A number of teachers have observed, however, that there is often a timelag before an improvement in attitude affects school work.

In the schools serving socioeconomic groups far higher than Lincoln's, however, the success of the transfer plan is by no means clear. The problems in the Roosevelt school, which received the largest numbers of transferees, are a subject of dispute in New Rochelle. Much of the argument centers on the personality and policies of Dr. Barbara Mason, the principal of Roosevelt school. The supporters of Dr. Mason contend that the following comparisons aside from race are a measure of the problems encountered. The average income of the Roosevelt families was approximately $25,000, while that of the transferees was about $4,000. In the great majority of the Roosevelt families both parents were college educated, while high school graduates were rare among the parents of the Lincoln children. The Roosevelt children came from stable homes where divorce was rare, while some 50 percent of the transferees had no male parent living at home. Lastly, while the median IQ of the Roosevelt children was approximately 125, that of their classmates from Lincoln was below 100.

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[103] Many people have asked other questions which also deserve answer. "What was accomplished in New Rochelle that could not have been accomplished without bitterness, disruption of the community, and harm to children?" Other people have questioned, "Where was the elected leadership of New Rochelle, or most of the religious leaders of all faiths, during the debacle?"

The Negro leadership of New Rochelle takes issue with these comparisons. They admit that there is a difference between the Roosevelt and the Lincoln children, but say that this difference has been grossly magnified. The Lincoln children may be deprived, they admit, but the children are not *that* deprived. They charge that in the previous comparison the income of the Roosevelt parents has been overestimated by one-third and that of the Lincoln parents has been underestimated by one-fourth. They assert that the majority of Lincoln parents are high school graduates, and while these critics are vague on the percentage of fatherless children, they assert that it is nowhere near 50 percent. Lastly, they point out that IQ tests are known to discriminate against lower income children by reflecting cultural environment as much as ability.

Although the cause and size are in dispute, the existence of a gap between the performance of the Roosevelt and Lincoln pupils is clear. This gap could not be closed in 1 year. During the trial, Dr. Mason had been quoted as saying that, although there were Negro children in New Rochelle capable of holding their own at Roosevelt in general they were not from the Lincoln area. Nonetheless, the teachers in Roosevelt exerted themselves to close the gap. They often gave up their lunch hours and stayed after school to provide special help for the Lincoln children and went to great trouble to meet with parents.[104] Yet often this was not enough, and some of the transferees, instead of being stimulated by the educational aspirations of the Roosevelt children, seemed to give up trying at all. In one grade, the average tested achievement of the transferees did not rise during the school year, despite the essentially private tutoring many of them had received from their teachers.

Probably the most unfortunate aspect of the Lincoln influx at Roosevelt has been its creation of racial stereotypes in the minds of

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[104] Teachers often found it difficult to contact parents who did not have telephones. In some cases parents failed to appear for as many as four consecutive appointments.

Roosevelt children. The record for the year shows that in a number of classes, no white child performed as poorly as the best of the Negro children did, and 89 percent of the Lincoln children finished the year in the lowest quarter of their respective classes. Dr. Mason's supporters say that the most unfortunate result of the poor showing of Lincoln transferees in Roosevelt is the creation of racial stereotypes in the minds of Roosevelt pupils. They claim that white children from a liberal background who had had no contact with Negroes before but whose home and school life taught ideals of brotherhood and the equality of man were thrown together with children of a far lower socioeconomic and cultural level who happened to be Negroes. One teacher said, "Some of the Roosevelt children actually understand that this is a cultural and not a racial difference, but all they see is that the Negro children are not as bright, clean, honest, or well behaved as they."

The Negro leadership of New Rochelle, while unable to disagree with the statistical data on the performance of the transferees at Roosevelt, takes issue with almost all of the other statesments by the supporters of Dr. Mason. They charge that a major reason for the poor performance of the Negro children at Roosevelt was that by a subtle combination of slights and patronizing behavior Dr. Mason made them feel unwelcome. It is difficult to resolve this type of controversy since the evidence is ambiguous. It may be noted, however, that in the Ward school where the problems of assimilating the transferees were conceded to have been well handled by the principal, Lee Kahan, the academic performance of the Lincoln transferees does not appear to have been significantly better than that of the transferees in Roosevelt.

Both sides to the Roosevelt controversy agree, however, that the picture of disaster at Roosevelt does not tell the whole story. In general, students who had been behavior problems at Lincoln improved in deportment at Roosevelt,[105] and teachers report that the motivation of many transferees seemed higher. One transferee finished in the upper half of her class, and in a number of individual cases the special efforts of the teaching staff produced notable improvement. Moreover, considering the time and effort spent by the teachers on the transferees, little, if any, harm seems to have been done to the educational progress of the Roosevelt children. Even though teachers had less time for them, they progressed as rapidly as in previous years.

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[105] This apparently was due to a number of effects, not the least of which was the feeling that, having been placed in an integrated atmosphere, they had to live up as best they could to what was expected of them. Moreover, children who were discipline problems before were distributed throughout the school.

A great many other problems still face New Rochelle. First, and dwarfing all others, is the question of what should be done with the Lincoln school. Many of the opponents of the school board have alleged that, to embarrass the Lincoln transferees, the board has poured in unprecedented amounts of money and effort into Lincoln to improve the education of those who stayed there. It is true that education at Lincoln has continued its steady improvement. But according to Dr. Joseph P. Robitaille, the principal of Lincoln, no special efforts were made this year. He said:

> The Lincoln school has been receiving a little bit more help each year, and this trend continued last year. We were helped by a slightly lower class size, but no exceptionally large amount of aid was provided the school, even on a per-pupil basis. It's strange that people should argue that education in Lincoln was too good. We've done our best, and it would seem pretty foolish to ask that we do less than that.

Nonetheless, the parents who kept their children at Lincoln have not taken the easy way out. They have been called Uncle Toms and Aunt Jemimas for allowing their children to remain at Lincoln. Now they seem passionately attached to the school. On the other hand, with the much smaller student body the fixed costs per pupil in Lincoln have gone up. Moreover, the school is getting older, so that in the near future the board will have to decide whether to replace it or close it down and transfer the pupils to other schools.

The Negro leadership of New Rochelle demands that the school be abandoned; they call it a symbol of segregation and claim that even though its patrons may not realize it, Lincoln is a segregated school, providing an inferior education which should not be tolerated in New Rochelle. On the other hand Lincoln school parents argue that they should not be denied a neighborhood school because of their race; that this would be a violation of their constitutional rights.

The next major problem connected with the Lincoln dispute involves a threatened racial imbalance at two nearby schools, Washington and Mayflower. As appendix F shows, with the exception of Roosevelt, Mayflower received the largest percentage of Lincoln transferees. Mayflower was 41.7-percent Negro during the first year of the transfer, and additional transfers from Lincoln are expected to raise the percentage in September 1962.[106] The Mayflower problem is further complicated by the uneven age distribution of Negroes in the school. Were each class 41-percent Negro, there probably would be little pressure for a white egress. Unfortunately, many classes, especially in the lower grades, will have a majority of Negroes next year. The departure of white children from such classes for private schools will not be counterbalanced by any influx of white children into classes where their race is in the majority, and hence the overall percentage of Negroes at Mayflower will tend to become greater. This trend will soon be aggravated further by the expansion of the parochial school across the street from Mayflower. At least some white children wishing to escape Mayflower probably will attend this school, even though the class size there will be approximately twice that in Mayflower.

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[106] Preliminary figures suggest that the percentage rise will be less than anticipated.

Although the racial imbalance in the Washington school, which has 54-percent Negroes, is worse than in Mayflower, its prospects for the future seem brighter. Washington has lived with its large percentage of Negroes for some time, and its white families, having had an opportunity to adjust to the growing number of Negroes in the community, do not seem inclined to leave. Moreover, the Lincoln parents responded to the urging of their leadership that too many transferees might result in Washington's becoming a segregated school, and showed restraint by avoiding transfer to Washington despite its convenience. Nonetheless, many observers have expressed the fear that in 10 years New Rochelle may have at least two schools as racially imbalanced as Lincoln is now. And, of course, this time interval might be reduced if the Lincoln school is closed and its present pupils distributed.

On the other hand, most New Rochelle residents seem to find the present racial balance in Washington and Mayflower acceptable; their worries are directed to the future. The example of successfully integrated, stable schools elsewhere in the United States suggests there is no reason to assume that Mayflower and Washington cannot achieve this state. The white parents of children there may decide that the high percentage of Negroes in the schools has not harmed their children's development, and in many ways has helped it. The example of the white children who remained at Lincoln may cause enough of a pause in any flight from Mayflower and Washington to allow the white children to benefit from the increasing educational effort that is being expended upon the Negro. Moreover, in the future the Negro community can be expected to use great restraint in requesting transfer to Mayflower and Washington and even in purchasing homes in those districts.

One other problem concerns New Rochelle more than its importance deserves. The private busing of the Lincoln children is expensive. There are those who argue that the Lincoln parents, by making sacrifices for their children's education, will appreciate its importance and encourage their children to do their best at school. Nonetheless, the transportation expense has placed a financial strain on those least able to afford it. Although contributions have been solicited in the community at large and about $15,000 has been raised, the cost of busing is a continuing financial burden on parents and others. Fortunately, New York State law has been changed so that it will no longer be prohibitively expensive for the school board to bus children at public expense. After 2 years, the State will pay 90 percent of the cost. Although the local school budget would have to carry more of the cost during the first 2 years,[107] and State law still requires that parochial and other private school children receive the same transportation as public school children, busing the Lincoln children at public expense will no longer be financially prohibitive.

A further area of battle unrelated to Lincoln is beginning to appear. One of New Rochelle's two junior high schools practices a rigid ability grouping which has left few, if any, Negroes in the fastest classes, and a preponderance in the slowest. Negro leaders have branded this type of grouping a method of segregating Negro children and of perpetuating the unfair treatment they have received in the elementary schools. The battlelines on this issue have not yet been clearly drawn, but unless some settlement is reached in the near future the tranquility of New Rochelle may be disturbed again.

Despite all the problems, most residents of New Rochelle are hopeful. However, they talk little in public about these school issues. Everyone seems to feel that these troubles can be handled quietly without generating more unfavorable publicity for the city.

The great majority of school board members who actively took sides in the Lincoln dispute are no longer serving, and most of the bitter antagonists on both sides have withdrawn from all controversy. Moreover, New Rochelle now has a new superintendent of schools, Dr. David G. Salten, a vigorous, nationally respected educator who enjoys the confidence of all factions. Dr. Salten, fortunately, has had 5 years[108] of experience with experiments in elementary school reorganization. He is not committed to the traditional k–6 neighborhood school, which has come under increasing attack from some educators as being expensive, inefficient, and productive of segregation. It appears that New Rochelle's hope for the future may lie in community acceptance of Dr. Salten's educational ideas and leadership.

New Rochelle, like other cities, will continue to have school problems. But most people in New Rochelle have confidence that solutions and compromises can be found. "The most important thing," they all say, "is to stay out of court."

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[107] During which the State will provide 30 percent and 60 percent, respectively, of the funds.

[108] Under a Ford Foundation grant.

APPENDIX A

New Rochelle Public School Enrollment—Nov. 14, 1961

School	Total	Number nonwhite students	Percent nonwhite
New Rochelle High	2, 230	264	11. 84
Albert Leonard Junior High	1, 623	308	18. 98
Isaac E. Young Junior High	1, 096	116	10. 58
Total secondary	4, 949	688	13. 90
Henry Barnard Elementary	626	118	18. 85
Columbus Elementary	307	54	17. 59
George M. Davis, Jr. Elementary	934	3	. 32
Jefferson Elementary	608	45	7. 40
Lincoln Elementary	483	454	94. 00
Mayflower Elementary	478	146	30. 54
Roosevelt Elementary	561	9	1. 60
Stephenson Elementary	398	105	26. 38
Trinity Elementary	900	51	5. 67
Ward Elementary	793	2	. 25
Washington Elementary	246	129	52. 44
Daniel Webster Elementary	398	118	29. 65
Total elementary	6, 732	1, 234	18. 33
Total	11, 681	1, 922	16. 45

APPENDIX B

New Rochelle Elementary Schools Median Reading Comprehension and Vocabulary Scores—5th and 6th Grades

School	Grade 5		Grade 6	
	Vocabulary	Comprehension	Vocabulary	Comprehension
Roosevelt	7. 4	6. 8	8. 7	7. 6
Ward	7. 4	5. 8	8. 3	7. 7
Davis	6. 7	6. 4	8. 5	8. 0
Webster	6. 0	5. 9	7. 7	7. 2
Mayflower	5. 9	5. 7	7. 3	7. 3
Barnard	5. 9	5. 6	7. 6	7. 5
Trinity	5. 9	5. 6	7. 6	7. 2
Jefferson	5. 3	5. 5	7. 6	7. 4
Stephenson	5. 2	4. 9	7. 3	6. 9
Columbus	5. 0	4. 8	6. 0	5. 9
Washington	4. 9	4. 7	6. 1	6. 1
Lincoln	4. 6	4. 3	5. 9	6. 1

APPENDIX C

New Rochelle Elementary Schools Mean IQ Scores—Grades 3 and 6, School Year 1959–60

[Tests: California Mental Maturity '57 S Form; Grade 3—Primary; Grade 6—Elementary]

School	Mean IQ		School	Mean IQ	
	Grade 3	Grade 6		Grade 3	Grade 6
Barnard	107. 2	115. 0	Roosevelt	114. 7	121. 0
Columbus	104. 8	90. 8	Stephenson	104. 5	105. 2
Davis	127. 1	120. 2	Trinity	117. 9	109. 2
Jefferson	114. 7	112. 3	Ward	112. 9	115. 0
Lincoln	100. 7	92. 8	Washington	93. 8	92. 2
Mayflower	112. 1	100. 7	Webster	114. 6	108. 9

APPENDIX D

New Rochelle Elementary Schools Reading Readiness Test Results

[Lee Clark Reading Readiness Test; Class of 1967 H.S. (present grade 6) (grade 5 in 1959–60)

School	*School mean grade equivalent*	School	*School mean grade equivalent*
Trinity School	1. 5	Roosevelt School	1. 3
Henry Barnard School	1. 4	Stephenson School	1. 2
Columbus School	1. 4	Daniel Webster School	1. 2
Geo. M. Davis, Jr., School	1. 4	Washington School	. 7
Mayflower School	1. 4	Lincoln School	. 5
Jefferson School	1. 3		

(Taken when these children were in kindergarten)

APPENDIX E

New Rochelle Elementary Schools Mean Grade Equivalent Achievement Test Scores, Negro Pupils in Grades 3 and 6—1959–60 School Year

[Tests Used: Grade 3—California Achievement, Form W; Grade 6—Iowa Achievement, Form 1]

Percent Negroes in School		Vocabulary		Reading comprehension		Concepts	Problem solving
		Grade 3	Grade 6	Grade 3	Grade 6	Grade 6	Grade 6
18.85	Barnard	3. 3	5. 9	3. 1	6. 0	6. 1	6. 2
17.59	Columbus	3. 4	5. 0	3. 3	5. 3	5. 6	5. 8
7.40	Jefferson	3. 8	5. 5	3. 5	5. 5	6. 0	5. 5
30.54	Mayflower	3. 9	7. 2	3. 7	7. 0	7. 1	6. 8
24.33	Stephenson	2. 5	5. 8	2. 5	5. 8	6. 2	6. 0
5.67	Trinity*	4. 0	6. 4	3. 1	6. 4	7. 7	7. 1
52.44	Washington	2. 9	5. 6	2. 6	6. 1	6. 0	5. 9
29.65	Webster	3. 7	6. 3	3. 3	6. 1	6. 9	6. 6
	Total mean averages	3. 4	6. 0	3. 1	6. 0	6. 4	6. 2
	Lincoln	3. 0	5. 9	3. 4	6. 1	5. 9	5. 7

*Results of small sample.

APPENDIX F

New Rochelle Elementary Schools Percentage of Negro Pupils Enrolled Before and After Transfer From Lincoln School

	Before transfers (February 1961)	After transfers (November 1961)		Before transfers (February 1961)	After transfers (November 1961)
Barnard	19. 1	24. 2	Roosevelt	1. 6	12. 8
Columbus	19. 1	19. 7	Stephenson	26. 6	25. 1
Davis	0. 3	0. 8	Trinity	5. 2	7. 2
Jefferson	7. 3	10. 7	Ward	0. 2	2. 8
Lincoln	93. 7	88. 6	Washington	50. 2	54. 0
Mayflower	32. 1	41. 7	Webster	29. 7	35. 7

APPENDIX G

[Advertisement]

STOP This Malicious NONSENSE

THERE IS NO RACIAL SEGREGATION IN THE PUBLIC SCHOOLS OF NEW ROCHELLE!

Every elementary school child attends the school of the district in which he lives.

Every junior high school student attends one of the two City-wide junior high schools and every senior high school student attends New Rochelle High School.

63% of the Negro children in the elementary schools attend schools other than Lincoln.

The Lincoln School PTA and parents of the children at Lincoln School want a new school for their neighborhood to replace the obsolete existing school, just as new neighborhood schools have been built in other school districts.

The Lincoln parents deserve a new school and the Board of Education, after long study, plans to build it for them.

If the financing for the cost of this new school with 30-year bonds is not authorized at the May 24th Referendum, the Board of Education has the power to build it with 5-year bonds without Referendum. This would substantially increase the tax rate to pay for such short term financing.

DON'T BE MISLED BY EXTREMISTS AND PROPAGANDISTS. Support the decision of the Board of Education and VOTE "YES" ON MAY 24th

The following P.T.A. Executive Boards Voted to Support the Board of Education's Proposal to Construct a New K–6 School on the Present Lincoln School Site:

New Rochelle High School
Isaac E. Young Jr. High School
Henry Barnard School
Columbus School
Davis School
Jefferson School
Lincoln School
Mayflower School
Roosevelt School
Stephenson School
Trinity School
Washington School
Ward School
Webster School

. . . also, the following Civic Organizations have endorsed a new K–6 school on the present Lincoln School site.

Columbian Civic League
New Rochelle Realty Board
New Rochelle Citizens for Public Education
Federation of Women's Leagues of America, Inc.

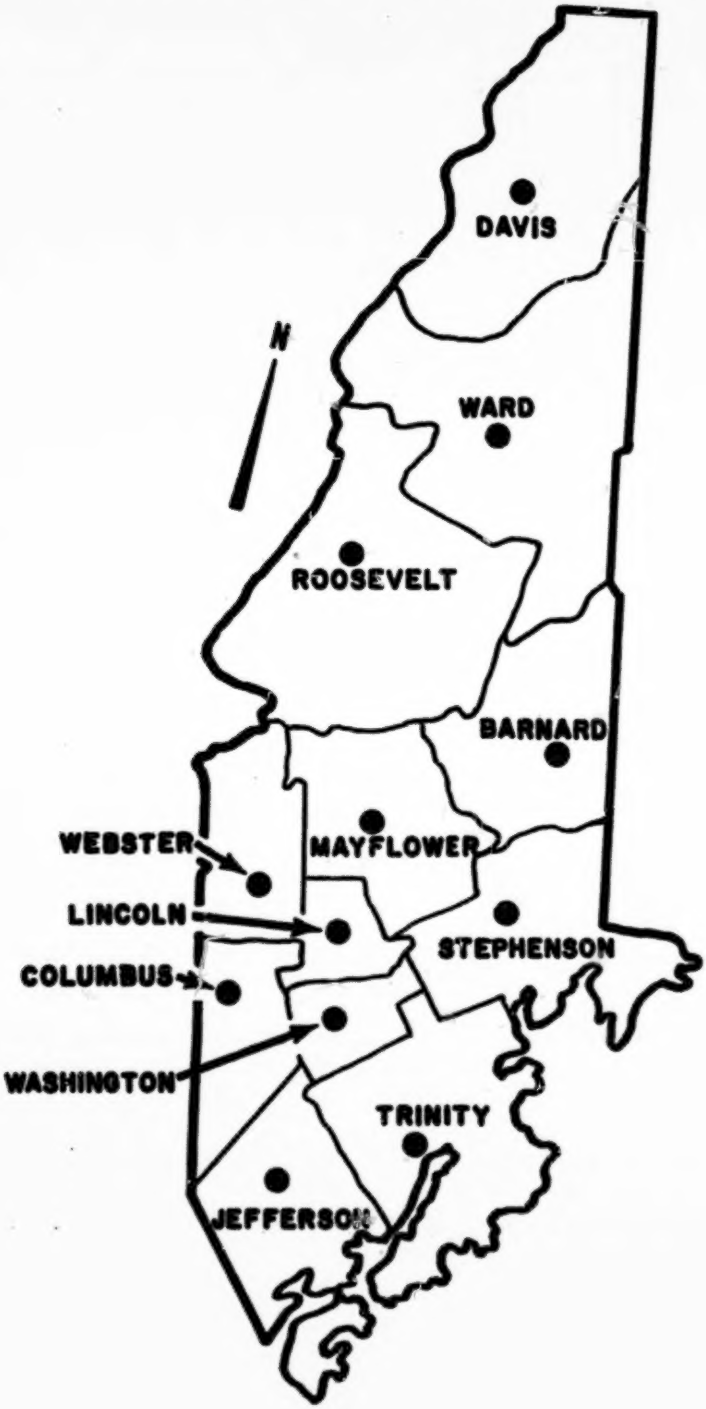
NEW ROCHELLE CITIZENS FOR A NEW LINCOLN SCHOOL

Henry Margulies, Chairman, Advertising Committee, 92 Liberty Avenue, New Rochelle

APPENDIX H

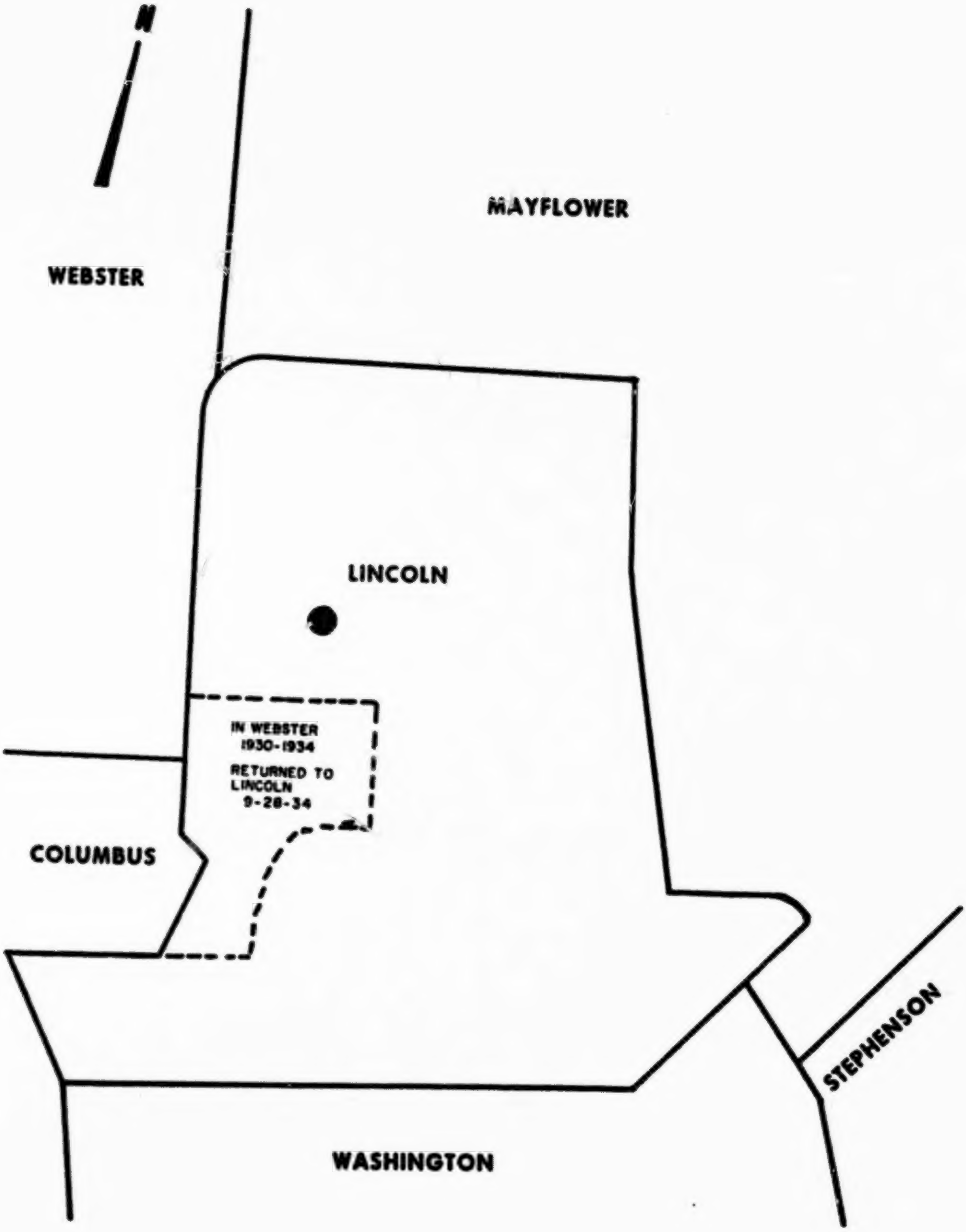
City of New Rochelle, New York

Elementary School Boundaries


N
DAVIS
WARD
ROOSEVELT
BARNARD
MAYFLOWER
WEBSTER
LINCOLN
COLUMBUS
WASHINGTON
STEPHENSON
TRINITY
JEFFERSON

APPENDIX I

Lincoln School Boundaries


N
WEBSTER
MAYFLOWER
LINCOLN
IN WEBSTER
1930-1934
RETURNED TO
LINCOLN
9-28-34
COLUMBUS
STEPHENSON
WASHINGTON

U.S. GOVERNMENT PRINTING OFFICE:1962